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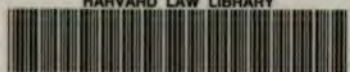
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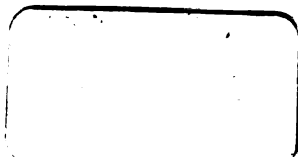


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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT OF JUDICATURE**  
**OF THE**  
**STATE OF INDIANA,**  
**WITH TABLES OF THE CASES REPORTED AND CASES**  
**CITED AND AN INDEX.**

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**By JOHN L. GRIFFITHS,**  
**OFFICIAL REPORTER.**

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**VOL. 124,**  
**CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1889,**  
**NOT PUBLISHED IN VOLS. 121, 122 AND 123, AND**  
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JUDGES  
OF THE  
SUPREME COURT  
OF THE  
STATE OF INDIANA,  
DURING THE TIME OF THESE REPORTS.

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HON. JOSEPH A. S. MITCHELL.\* †  
HON. JOHN G. BERKSHIRE. § †  
HON. WALTER OLDS. †  
HON. SILAS D. COFFEY. †  
HON. BYRON K. ELLIOTT.||

\* Chief Justice at the November Term, 1889.

† Term of office commenced January 6th, 1885.

‡ Chief Justice at the May Term, 1890.

† Term of office commenced January 7th, 1889.

|| Term of office commenced January 3d, 1887.

**OFFICERS**  
**OF THE**  
**SUPREME COURT.**

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**CLERK,**  
**WILLIAM T. NOBLE.**

**SHERIFF,**  
**JAMES L. YATER.**

**LIBRARIAN,**  
**WILLIAM W. THORNTON.**

**CASES**

**ARGUED AND DETERMINED**

IN THE

**SUPREME COURT OF JUDICATURE**

OF THE

**STATE OF INDIANA,**

AT INDIANAPOLIS, NOVEMBER TERM, 1889, IN THE SEVENTY-  
FOURTH YEAR OF THE STATE.

No. 14,181.

**BUNNELL v. THE BOARD OF COMMISSIONERS OF WHITE  
COUNTY ET AL.**

**TOWNSHIP TRUSTEE.**—*Settlement.*—*Appeal from County Commissioners.*—A taxpayer who alleges that he is aggrieved by the action of the board of county commissioners in approving a report and settlement made by the sureties on the bond of a township trustee, can not appeal to the circuit court by filing an affidavit and appeal bond. In making settlements with township trustees, and in the examination and confirmation of their reports, county commissioners act, not judicially, but in a ministerial capacity, and the general right of appeal authorized by statute is applicable only to decisions of a judicial character.

From the White Circuit Court.

*T. F. Palmer* and *A. K. Sills*, for appellant.

*E. B. Sellers*, for appellees.

**MITCHELL, C. J.**—The question involved in this appeal is whether or not a taxpayer who alleges that he is aggrieved by the action of the board of county commissioners in ap-

124	1
126	208
126	506
124	1
140	73
124	1
144	592
124	1
156	457
156	458
124	
169	171

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**Bunnell v. The Board of Commissioners of White County et al.**

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proving a report and settlement made by the sureties on the bond of a township trustee can appeal to the circuit court by filing an affidavit and appeal bond. It is abundantly clear that the question must be answered in the negative.

The statute requires township trustees to make reports and file accounts and vouchers, showing the amount of receipts and expenditures, and to file itemized statements of their charges for services, and to make annual settlements with the boards of commissioners of their respective counties. Sections 5997, 5998, 6001, R. S. 1881.

In making settlements with township trustees, and in the examination and confirmation of their reports, county commissioners do not act judicially. The Legislature has committed to county boards certain supervisory power over the official conduct of township trustees, in regard to levying taxes, incurring debts, and the inspection of their accounts and the like. In exercising these duties the board acts in a purely administrative or ministerial capacity, and when so acting its determination is not conclusive, nor does it affect individual rights, and hence no right of appeal exists, unless it is especially conferred by statute. *Hunt v. State, ex rel.*, 93 Ind. 311.

The general right of appeal authorized by statute and given to any person or corporation feeling aggrieved by any decision of the board of commissioners, means any decision of a judicial character, and is not applicable to decisions made by the board in matters pertaining to its administrative or ministerial duties, nor to those which are merely within the discretion of the board. *Waller v. Wood*, 101 Ind. 138; *Platter v. Board, etc.*, 103 Ind. 360 (374); *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *Board, etc., v. State, ex rel.*, 106 Ind. 270.

By the express terms of the statute (section 5811, R. S. 1881), no one is concluded by settlements thus made, unless, in the absence of mistake, it be the township trustee or his sureties, and we can not well perceive what the circuit court

## Stefani v. The State.

could have tried upon appeal if one had been allowed. *McKee v. Gould*, 108 Ind. 107; *Wilkinson v. Lemasters*, 122 Ind. 82.

The judgment is affirmed, with costs.

Filed May 16, 1890.

124	3
128	500
134	3
144	242
147	102

No. 15,483.

## STEFANI v. THE STATE.

**CRIMINAL LAW.—Perjury.—Sufficiency of Affidavit.**—An affidavit, and an information based thereon, charging the defendant with perjury, alleged that on a certain day, before the mayor of the city of Indianapolis, sitting as a court, an affidavit was filed by James R. Shea, charging the defendant with knowingly permitting a certain room to be used and occupied for gaming; that the defendant was arraigned upon said affidavit and tried before said mayor; that upon said trial the defendant offered himself as a witness in his own behalf, and was duly sworn by said mayor, he having authority to administer said oath; that, upon the trial of said issue, it became material whether certain persons named were in a certain room known as 306 East Washington St., in said city, on Sunday, and whether on said day, in said room, they were playing cards for money; that the defendant then and there swore, on the trial of said issue, unlawfully, feloniously, wilfully, corruptly and falsely, that the said persons were not in said room on said day, and did not play cards for money in said room on said day. Then follows a proper negation of the truthfulness of the defendant's testimony, together with the averment that the defendant knew when he gave the testimony that it was false.

*Held*, that the affidavit was sufficient.

**SAME.—Variance.**—The affidavit in the prosecution for perjury charged that the affidavit before the mayor was made by James R. Shea. The record entry made by the mayor stated that the affidavit was made by R. Shea, but the affidavit as it appears in such record discloses the name of "James R. Shea" subscribed thereto.

*Held*, that there was no variance.

**SAME.—Affidavit.**—It having been alleged in the affidavit that the prosecution was instituted and tried before the mayor of Indianapolis sitting as a court, the court in which the perjury is alleged to have been committed is sufficiently described.



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Stefani v. The State.

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**SAME.—Filling of Blank in Affidavit.**—The filling of the blank in the affidavit with the street number of the building after the trial was commenced, the affidavit not being filed thereafter nor resworn to, was not available error, as the number of the building was immaterial to the sufficiency of the affidavit.

**SAME.—Affidavit and Information.—Filing in Open Court.—Statute.**—The affidavit and information are not required by statute to be filed in open court as are indictments. It is sufficient to file the information with the clerk.

**SAME.—Word "Session" in Section 1679, R. S. 1881.—Meaning of.**—The word "session," as employed in section 1679, R. S. 1881, is equivalent to the word "term," when applied to the sitting of a court, and does not mean that the court must be actually open for the transaction of business.

From the Marion Criminal Court.

*W. B. Walls* and *G. L. Walls*, for appellant.

*L. T. Michener*, Attorney General, and *J. H. Gillett*, for the State.

**BERKSHIRE, J.**—An affidavit and information were filed against the appellant charging him with the crime of perjury. He moved the court to quash the affidavit and information, which motion was overruled by the court, and he excepted; thereupon he pleaded not guilty to the charge, and the issue joined was submitted to a jury for trial, who afterwards returned a verdict that the appellant was guilty as charged, and that he be imprisoned in the State's prison for the period of four years and pay a fine of \$50. He filed a motion for a new trial, which was overruled by the court, and he excepted, and finally he moved in arrest of judgment, and said motion being overruled he reserved an exception, and thereupon the court gave judgment according to the verdict of the jury.

We have carefully examined the affidavit and information, and find no infirmity in either; the information follows the affidavit in its statement of facts.

The substance of the affidavit is, that, on the 19th day of February, 1890, at the county of Marion and State of Indiana, before Thomas L. Sullivan, mayor of the city of In-

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Stefani v. The State.

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dianapolis, sitting as a court, an affidavit was filed and presented by James R. Shea against the appellant, charging him with knowingly permitting a certain room to be used and occupied for gaming, and that such proceedings were had that the appellant was brought before said court and duly arraigned upon said affidavit, and pleaded not guilty thereto; and thereafter, and on the same day, before said mayor, sitting as aforesaid, he having full and competent authority in that behalf, a trial was had and held for the purpose of determining the guilt or innocence of the appellant; that upon said trial the appellant offered himself as a witness in his own behalf, and was then and there duly sworn by said mayor, he then and there having competent authority to administer said oath; that upon the trial of said issue and point in question, it became material whether certain persons named were in a certain room known as 306 East Washington street in said city of Indianapolis, on Sunday, the 16th day of February, 1890, and whether the said persons were playing cards for money in said room on said day, the said room being then and there occupied by the appellant as a saloon; and that the appellant then and there, on the trial of said issue, unlawfully, feloniously, wilfully, corruptly and falsely, before the said mayor, in said matter, did depose and swear in substance and in fact, and to the effect that the said persons were not in said room on said 16th day of February, 1890, and did not play cards for money in said room on said day. Then follows a proper negation of the truthfulness of the appellant's said testimony, together with the averment that the appellant knew when he gave the testimony that the same was false.

Three objections are taken to the affidavit:

1. The testimony upon which perjury is assigned was not material to the point in question.
2. The materiality of the false testimony is not sufficiently charged.

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Stefani v. The State.

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3. The court in which the perjury is alleged to have been committed is not sufficiently described.

None of these objections are tenable.

The prosecution in the mayor's court wherein the false testimony is alleged to have been given rested upon section 2079, R. S. 1881, and reads thus: "Whoever keeps a building, room, arbor, garden, booth, shed, tenement or canal-boat, wharf-boat, or other water-craft, to be used or occupied for gaming; or who knowingly permits the same to be used or occupied for gaming, \* \* \* shall be fined not more than five hundred dollars nor less than ten dollars."

We can not imagine more pertinent and material testimony for the State in prosecutions under the section quoted than that which relates to specific acts of gaming in the building or room named in the indictment or information, and evidence given by the accused to meet and overthrow testimony of that character introduced by the State is equally pertinent and material.

The averments in the affidavit are clearly within the provisions of section 1747; and that the testimony of the appellant upon which perjury is assigned was material and false abundantly appears. The court in which the false testimony is charged to have been given is clearly and definitely stated. The affidavit discloses the facts that Thomas L. Sullivan was the mayor of the city of Indianapolis, and that while sitting as a court the prosecution on the trial of which the perjury charged is alleged to have been committed, was instituted and tried, and it is wholly immaterial by what name the court thus held is known; the facts stated show what court it was that Mayor Sullivan was holding. We do not think the court erred in overruling the motion for a new trial.

The street number by which the building was known was wholly immaterial to the sufficiency of the affidavit, which was the foundation of the prosecution before the mayor, and, therefore, the filling of the blank after the trial had commenced was of no importance one way or the other; the af-

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Stefani v. The State.

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fidavit was not thereafter refiled, nor was it resworn to; hence, no more additional proof was required than if the number of the building had not been inserted.

It is contended that the record of the proceedings in which the perjury is alleged to have been committed was not introduced in evidence; in this appellant's counsel are mistaken. The bill of exceptions has this statement: "This cause being called for trial, the jury being elected, tried, and sworn to try the same, the State of Indiana to maintain, and prove the material allegations of the affidavit, introduced the following evidence, to wit:" and then follows what purports to be the evidence, including the said record. At the close of the bill of exceptions is the following: "And this was all the evidence given in the cause."

But the further point is made, that were the record in evidence it would appear therefrom that the offence alleged in the affidavit in this case is not the offence for which the appellant was prosecuted before the mayor, and not only that, but that he was prosecuted before the mayor for no offence known to the law.

Taking the record as a whole, there is no variance between it and the affidavit, in this prosecution, as to the offence for which the appellant was prosecuted before the mayor. The affidavit which was the basis of that prosecution appears in the record, and discloses the character of the prosecution.

It is further contended that the affidavit in the present prosecution charges the affidavit before the mayor to have been made by one "James R. Shea," but that the record of that proceeding, which was identified by the mayor, when testifying as a witness in this trial, discloses that the said affidavit was made by one "R. Shea."

The record entry made by the mayor does omit the given name, "James," but the affidavit, as it appears in the said record, discloses the name of "James R. Shea," subscribed thereto.

The point is made that the appellant is not identified as

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Stefani v. The State.

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the person who gave the alleged false testimony before the mayor. No witness pointed to the appellant and said, "He is the man I heard testify before the mayor," but it very satisfactorily appears from the evidence in the record that he is the same person.

We finally come to the motion in arrest of judgment. It is claimed that the court had no jurisdiction, for the reason that there is no record of the filing of the affidavit and information in open court, and nothing to show that the criminal court was in session when the affidavit and information were filed.

This is wholly unnecessary, for the very good reason that the statute does not require the affidavit and information to be filed in open court. There is such a provision with reference to indictments, and the reasons therefor are manifest when sections 1669, 1670, 1671, 1672, are considered; but no such reasons exist with reference to prosecutions by information, and section 1672 recognizes the fact that it is only necessary to file the information with the clerk.

The word "session," as employed in section 1679 of the statute, does not mean that the court must be actually open for the transaction of business; the statute does not say "open session."

The word is used as meaning the same thing as the word "term," when applied to the sitting of a court.

Worcester gives the following definition: "The time or term during which a court, a legislative body, or other assembly, sit, with no other interval than short intermissions, or daily adjournments; the time between the first meeting of an assembly and its prorogation, or final adjournment; as, 'a session of Congress.'" Webster gives substantially the same definition.

Our conclusion is not in conflict with *Hoover v. State*, 110 Ind. 349. In that case the record disclosed the fact that the affidavit and information were filed in vacation; in the case before us the contrary appears. It appears not only that the

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affidavit was filed in term time, but the jurat of the clerk shows that the affidavit was verified in open court.

We do not think the court erred in overruling the motion in arrest of judgment.

Judgment affirmed, with costs.

Filed April 29, 1890 ; petition for a rehearing overruled May 16, 1890.

No. 14,827.

DREW v. THE STATE.

**JUROR.**—*Misconduct of.*—*What will Not Constitute.*—Where, after a jury had retired to deliberate on a verdict, and while they were going to supper in the custody of the bailiff, one of the jurors became accidentally separated from the remainder of the panel, such separation lasting ten or fifteen minutes, and the affidavit of the juror discloses that during such separation he spoke to no one but the counsel for the appellant, and no one did anything to influence his verdict, and that he was in no way influenced by such separation, and no improper conduct is charged against the juror except the mere fact of separation, a new trial will not be granted on the ground of such alleged misconduct.

**CRIMINAL LAW.**—*Misconduct of Prosecuting Attorney.*—*When not Ground For New Trial.*—Where, on the trial of a criminal cause, the prosecuting attorney made a remark to which the counsel for the defendant objected, and the court stated that "the statement of the prosecuting attorney was improper," and the prosecutor said, "Then I withdraw the remark," and the court was not asked to make any ruling in respect to the remark of the prosecuting attorney, there was no error in refusing to grant a new trial because of the alleged misconduct of the prosecuting attorney in making said statement.

**SAME.**—*Evidence.*—*Coroner's Record.*—*Oral Testimony as to Contents of.*—*Competency of Not Properly Raised.*—Where a coroner testified orally as to what a certain witness had stated on the inquest, but no objection was made at the time to such testimony on the ground that the coroner was giving oral testimony of the contents of his record made at the inquest, no question is presented by the motion for a new trial assigning such reason as an objection to the competency of the evidence.

**SAME.**—*Bad Character of Accused.*—*Evidence as to.*—*When Competent.*—Where

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140	166
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146	276
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170	214

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the defendant in a criminal case testifies in his own behalf, it is competent for the State to introduce evidence as to the general bad moral character of the accused.

**SAME.—Specific Unlawful Acts.—Evidence Concerning.—When only Admissible.**—In a criminal case, after evidence has been introduced as to the general bad moral character of the accused, it is not competent for the State to prove the defendant's reputation in regard to the commission of a specific unlawful act. Proof can not be introduced by the State of specific traits of character of the defendant, unless the accused first puts such traits of character in issue by the introduction of evidence as to his general reputation in that respect.

From the Tippecanoe Circuit Court.

*W. R. Wood and W. C. Wilson*, for appellant.

*L. T. Michener*, Attorney General, *G. P. Haywood*, Prosecuting Attorney, *J. B. Milner*, and *J. H. Gillett*, for the State.

**OLDS, J.**—The appellant, Daniel Drew, was indicted by the grand jury of Tippecanoe county for the murder of John Mackessy, who was killed on the 3d day of August, 1887. The indictment contains three counts, all charging murder in the first degree.

Appellant made a separate motion to quash each count of the indictment, which motion the court overruled, and the appellant excepted. The appellant was arraigned, and entered a plea of not guilty; a trial was had, and a verdict returned finding the appellant guilty of murder in the second degree, as charged, and that he be imprisoned in the State's prison during life.

Appellant moved the court for a new trial, which motion the court overruled, and the appellant excepted. Judgment on the verdict, and appellant sentenced by the court.

Appellant assigns as errors the overruling of the motion to quash each count of the indictment, and the overruling of the motion for a new trial.

The error assigned on the ruling on the motion to quash the indictment is not discussed, and no question is made as to the sufficiency of the indictment.

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Drew v. The State.

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The only questions discussed by counsel for appellant arise on the motion for a new trial.

The first question discussed is in regard to the alleged misconduct of David McLaughlin, a juror, in the trial of said cause, such misconduct being assigned as a cause for a new trial.

The facts, as they appear from the affidavits filed in support of the motion and counter-affidavits, are, that after the jury had retired to deliberate on a verdict, at about 7 o'clock in the evening, the bailiff started with the jurors to take the jurors to supper, in a body, and as they stepped out of the jury-room in the court-house, near by a water-closet in the building, a number of the jurors, including McLaughlin, stepped into the water-closet, the bailiff and the other jurors waiting for them to return; within a very few moments they all returned except McLaughlin; the bailiff, supposing all the jurors were present, started with them to supper, a distance of about three squares; immediately after the bailiff and the eleven other jurors had gone out of the court-house McLaughlin came out of the water-closet, and the other jurors being absent he saw one of the counsel for the appellant standing near by and asked him if the other jurors had gone; the counsel replied that he guessed they had; McLaughlin inquired how to get out of the court-house, and the counsel directed him, and the juror went directly to the boarding-house, about three squares distant, where the jurors were to get their supper, arriving there immediately after the other members of the jury had reached the boarding-house, and was not separated from the remainder of the jury to exceed ten to fifteen minutes. The juror swears, in his affidavit, that he spoke to no person except the counsel for appellant, as aforesaid; that he saw no person that he recognized, and no person spoke to him, or did anything by words, signs, or gestures, or in any way, to influence his verdict; and that he was in no way influenced by such separation, or while separated, and no person tampered



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Drew v. The State.

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with, or attempted to tamper with or influence him, and no improper conduct is charged against the juror except the mere fact that he was separated from the other jurors in the manner aforesaid for a very few moments. It is perfectly evident and certain that the defendant was in no way injured, or his rights prejudiced, by the accidental separation of this juror from the remainder of the panel for the few moments, at a time when the jury were not deliberating.

A defendant, in a criminal case, is not entitled to a new trial on account of the misconduct of a juror, unless it be shown that such misconduct was prejudicial to the rights of the defendant, or such a state of facts is shown from which it may fairly be presumed that the defendant's rights were prejudiced. *Henning v. State*, 106 Ind. 386; *Mergentheim v. State*, 107 Ind. 567; *Riley v. State*, 95 Ind. 446; *Cooper v. State*, 120 Ind. 377.

Appellant assigns as a cause for a new trial the misconduct of the prosecuting attorney in the closing argument of the cause. It is shown that the prosecuting attorney, in his closing argument to the jury, said: "Daniel Drew was a common wife beater, and is unworthy of belief," to which statement the appellant, by counsel, at the time objected, and the court stated that "the statement of the prosecuting attorney was improper," and the prosecutor said, "Then I withdraw the remark."

There is no ruling of the court adverse to the appellant. The court was not asked to make any ruling in regard to the remark of the prosecuting attorney. There is no error in not granting a new trial for this cause. *Coleman v. State*, 111 Ind. 563; *Grubb v. State*, 117 Ind. 277; *Waterman v. State*, 116 Ind. 51; *Staser v. Hogan*, 120 Ind. 207.

It is contended that the court erred in permitting Dr. W. R. Moffit, the coroner who held an inquest over the body of John Mackessy, the deceased, to testify orally as to what Mrs. Drew testified to at the coroner's inquest, on the ground that it was permitting oral testimony of the coroner's record

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made at said inquest. The doctor was called and testified to what Mrs. Drew had testified to at such inquest, but no objection was made at the time to such testimony on the ground that the coroner was giving oral testimony of the contents of his record made at the inquest, and hence no question is presented by the motion for a new trial assigning such reason as an objection to the competency of the evidence.

The appellant testified as a witness in his own behalf, and the State then called witnesses who testified to the general bad moral character of the appellant. To this evidence the appellant objected, and the objection was overruled, and the ruling assigned as a cause for a new trial. This question has heretofore been decided by this court holding such evidence competent. *Keyes v. State*, 122 Ind. 527.

When a defendant in a criminal cause testifies as a witness in his own behalf, he is subject to the same rules of examination and impeachment as other witnesses.

One Patrick Lynch was called as a witness on behalf of the State, and testified that he was acquainted with the general moral character of the defendant, and that it was bad. The witness was then cross-examined by counsel for the defendant. On re-examination counsel for the State asked the witness the following question:

"Did you ever hear of him (Drew) beating his wife?" To which question objection was made by the defendant, and the court overruled the objection, and the defendant excepted. The witness answered, "Yes, sir." The ruling of the court is properly assigned as a cause for a new trial.

We have read the evidence in the case, and it is very doubtful whether it supports the verdict of murder in the second degree as found by the jury. The homicide occurred at the defendant's own house. It is contended on the part of the defence that deceased came to the house of the defendant in the evening; that defendant and his wife had been drinking beer during the day and evening; that the deceased

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came to the house without invitation, but was welcomed, and he furnished money and sent the defendant after more beer and a bottle of whiskey. After remaining there until a late hour he again furnished money to defendant and sent him after more beer and whiskey, and while he was absent he attempted to outrage the defendant's wife against her will, and while she was in an intoxicated condition, and the defendant returned and caught deceased attempting to outrage his wife, and a fight ensued, in which defendant struck the blow causing the death of the deceased. On the other hand, it is contended by the State that the defendant, his wife and the deceased were at defendant's house engaged in drinking beer and whiskey, and singing, and that defendant attempted to beat his wife, and the deceased interfered, a fight ensued, and defendant struck the blow causing the death of the deceased; that deceased was first knocked down and rendered insensible, and dragged from the house, and afterwards defendant came out of his house and struck the fatal blow.

It is evident from the testimony that defendant and his wife were in the habit of indulging in the use of intoxicating liquors; that they had been doing so on the day and evening of the homicide.

It does not appear that the deceased was an intimate friend of defendant and his wife, but a mere acquaintance, residing in another part of the city; that he had never been at the house of defendant to exceed twice; that some difficulty had occurred between the parties before, relating to a conversation between the deceased and the wife of the defendant, in which defendant claimed the deceased had insulted her, and some controversy had occurred between defendant and deceased about it, but which had been apparently settled. The deceased met the wife of defendant on the street, on the evening of the homicide, about 8 o'clock, going for a bucket of beer. The deceased had been at the saloon, and taken a drink of beer. Immediately after the wife of defendant returned home, deceased came to the house of the defendant.

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Drew v. The State.

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Soon afterwards defendant went to the saloon and purchased a bucket of beer and a bottle of whiskey, also drank a glass of beer, and returned to his house again. It is evident from the testimony that the deceased knew the defendant and his wife had been drinking, or at least that the wife was taking home beer.

There is no reason disclosed by the evidence for the deceased going to the house of defendant upon this occasion. From the testimony of police officers and neighbors everything remained quiet about the house until a late hour at night, when the fight took place, resulting in the death of the deceased about eleven or twelve o'clock at night. No witness was present at the house during the evening except defendant and his wife, and no other witness pretends to testify as to the origin of the trouble; both defendant and his wife testify that the origin of it was an attempt on the part of the deceased to have sexual intercourse with the wife by force. The wife was dealt a severe blow, and was severely injured at the time of the homicide. There is evidence to the effect that the wife made statements at different times about the time of the homicide, at the coroner's inquest and other times before the trial, contrary to her testimony in court; that she stated that deceased did not attempt to commit an outrage upon her, and that he was not that kind of a man, and that after she drank the liquor she was so drunk she did not know what occurred.

Numerous witnesses testified as to the defendant's bad moral character, but such testimony was all to the effect that he would get drunk, and that he was abusive to his wife.

The defendant, after the homicide, and before it was discovered, left the house and went into another part of the city, and came back about three o'clock in the morning, within three or four hours from the time of the altercation, and was arrested by a police officer. One of the first statements he made was that he was coming back to finish them, referring to both his wife and the deceased, and that the

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Drew v. The State.

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cause of the altercation was the attempt of the deceased to take advantage of a drunken woman. At the time the defendant made these statements he was not aware that Mackessy's injury was fatal.

There are facts in the case in addition to the testimony of the defendant and his wife tending to support the theory that the altercation was brought about and produced by an attempt on the part of the deceased to outrage the wife of the defendant, or on account of an insult to her, and that all that occurred took place on the spur of the moment, in the heat of passion, without malice, and voluntarily upon a sudden heat, making the crime no greater than voluntary manslaughter.

While, upon the other hand, if the evidence of the defendant and his wife is cast out of the case, and the statements of the wife made out of court explanatory of the cause which produced the altercation are to be taken as stating the true cause, the defendant is guilty of murder. But the statements of the wife are only competent to be given in evidence for the purpose of impeaching her, and are not competent as affirmative evidence against the defendant. The defendant can not be prejudiced by statements made by his wife to third parties, in his absence, after the homicide. This is, no doubt, the theory the jury took of the case, and there being evidence tending to support that theory this court will not reverse the case on the evidence; but the evidence presents such a case that the court can not say, after looking into the evidence, that improper evidence introduced in relation to the defendant beating his wife may not have influenced the jury in arriving at the conclusion they did, and that the evidence, although erroneously admitted, was harmless, and did not tend to influence a verdict finding the defendant guilty of murder. So that, if the ruling of the court in admitting such evidence is erroneous, the judgment must be reversed; and it appears that the fact that defendant had, before that time, been cruel to his wife, was given considera-

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Drew v. The State.

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ble prominence in the trial; the prosecuting attorney, commenting upon it in argument, although the wife testified that the injury she received at the time of the homicide was received by the defendant pushing her, and that she fell upon the stove, though it appears she had made contrary statements about it.

It is a well-recognized legal principle that a witness can not be impeached by proof of specific acts of immorality, nor can proof be introduced by the State of special traits of character of the defendant in a criminal case, unless the defendant first puts such traits of character in issue by the introduction of evidence as to his general good character in that respect. *Stitz v. State*, 104 Ind. 359; *McDonel v. State*, 90 Ind. 320; *Robinson v. State*, 84 Ind. 452; *Walker v. State*, 102 Ind. 502; *State v. Bloom*, 68 Ind. 54 (34 Am. Rep. 247); *Fletcher v. State*, 49 Ind. 124; 3 Am. & Eng. Encyc. of Law, p. 110.

The case of *Robinson v. State*, *supra*, involved a question quite similar to the one under consideration. The defendant had testified in his own behalf, and the State, at the proper time, for the purpose of impeaching the defendant as a witness, called a witness and proved by the witness that he was acquainted with the defendant's general moral character, and that it was bad. The defendant's counsel cross-examined the witness, asking the question: "The defendant has the reputation of being a drinking, swearing man, has he not?" The witness answered: "He has." On re-examination, the State asked the witness the following question: "What is the defendant's reputation for honesty?" The defendant objected, and the court overruled the objection, and the witness answered, it was bad. On appeal, this court held that the evidence was improper, and that the court erred in admitting it.

The evidence admitted in this case was clearly incompetent. It was permitting the State to prove the defendant's

*Metty et al. v. Marsh et al.*

reputation in regard to the commission of a specific unlawful act, and the court erred in overruling the defendant's objection to the question; and in view of the fact that the evidence is of such a character that this court can not say the jury were not influenced by such evidence in returning the verdict of guilty of murder in the second degree, the judgment must be reversed. If the evidence was of such a character that it manifestly appeared that the defendant was not injured by such evidence, then it might be proper to affirm the judgment, notwithstanding such error; but it does not so appear to the court.

Judgment reversed, and cause remanded for a new trial.

The clerk will give the proper notice for the return of the prisoner.

Filed April 5, 1890; petition for a rehearing overruled May 15, 1890.

124 18  
128 147

124 18  
130 595

124 16  
131 582

132 456

124 18  
134 486

136 457

124 18  
138 665

124 18  
142 401

143 247

124 18  
144 78

124 18  
155 654

156 665

156 660

124 18  
163 235

163 486

124 18  
168 562

124 18  
171 15

No. 13,990.

**METTY ET AL. v. MARSH ET AL.**

**DRAINAGE.—Appeal.—Amendment of Petition.**—Upon an appeal in a drainage proceeding, begun before the board of commissioners, it is in the discretion of the circuit court to permit an amendment of the petition.

**SAME.—Location of Ditch.—Description.**—Under the statute, section 4286, R. S. 1881, a particular description of the location of the proposed ditch, or drain, is not required. The petition is sufficient if it contains a general description of the proposed starting point, route, and terminus of the ditch.

**SAME.—County Commissioners.—Remonstrance. — Appeal.**—All grievances growing out of the establishment and construction of a public ditch should be presented to the board of commissioners, and settled in that tribunal. The aggrieved parties may remonstrate before the board against the report of the viewers, or reviewers, and where, having opportunity to file their remonstrances, they fail to do so, the circuit court may properly refuse to allow them to be filed on appeal.

**SAME.—Appeal.—Motion for Judgment.**—Where, on such appeal, there is

*Metty et al. v. Marsh et al.*

no issue for trial, it is not error for the court, the question of the jurisdiction of the board having been disposed of, to sustain the appellee's motion for judgment establishing the ditch, on the petition, report of viewers, etc.

From the Wells Circuit Court.

*E. C. Vaughn, J. S. Dailey, L. Mock and A. Simmons*, for appellants.

*A. N. Martin, C. M. France and M. W. Lee*, for appellees.

**COFFEY, J.**—Under the provisions of sections 4285 and 4286, R. S. 1881, the appellee filed a petition with the board of commissioners of Wells county at its September term, 1886, praying the location and construction of a public ditch. The proposed ditch is described in the petition as follows:

“Commencing at a point about the center of the east half of the southeast quarter of section seventeen (17), in township twenty-five (25) north, range twelve (12) east, thence in a northeasterly direction to a point about twenty (20) rods west of the southeast corner of the northeast quarter of said southeast quarter; thence north about forty (40) rods; thence a little north of west until it intersects the Rockcreek ditch, said proposed ditch to follow the natural channel for water the entire distance.”

Upon the filing of the petition, and the bond required by the statute, said board appointed three viewers to view, mark out and locate the ditch as prayed for in the petition. The viewers filed their report at the December term of said board, 1886, in which they reported that the proposed ditch would be of public utility, and assessed the cost of construction of the same to the parties to be affected thereby as follows:

<i>Names.</i>	<i>Am't of Benefits.</i>	<i>Assessments.</i>
Harrison Marsh .....	\$391 70	\$195 85
Lydia S. Metty.....	116 84	58 42
Isaac H. Turner.....	83 28	41 64
Isaac Hahn.....	50 38	25 19

Upon the filing of this report the appellee Harrison Marsh



*Metty et al. v. Marsh et al.*

remonstrated against the same, upon the ground that the benefits assessed against his land were too high, that the ditch was not located by said viewers upon the most practicable route, and that there were other lands not described in the report which would be benefited by said ditch, and should be assessed for the costs of its construction.

After consideration of this remonstrance said board appointed three reviewers, who filed their report at the March term of said board of commissioners for the year 1887.

In this report the reviewers assessed the benefits and costs occasioned by the construction of the ditch as follows :

<i>Names.</i>	<i>Benefits.</i>	<i>Costs.</i>
Harrison Marsh.....	\$343 84	\$171 92
Lydia S. Metty.....	184 20	92 10
Isaac H. Turner.....	125 78	67 89
Isaac Hahn.....	46 98	23 49
Wells county.....	30 00	15 00
James E. Lockwood.....	30 00	15 00

The notice required by the statute having been given, and no further remonstrance or objection being made, the board of commissioners of Wells county heard the evidence on said petition on the 8th day of March, 1887, and entered up an order on its records establishing said ditch.

On the 11th day of March said Isaac H. Turner, James E. Lockwood, Lydia S. Metty and Isaac Hahn filed with the auditor of said county their separate appeal bonds, and prayed an appeal of said cause to the circuit court.

In the circuit court appellants moved to dismiss the cause, on account of the insufficiency of the petition.

During the pendency of this motion the appellee asked and obtained leave to amend the petition, which was done, and the motion was overruled. The appellants also moved to dismiss the amended petition, whereupon the appellee moved for judgment establishing the ditch in controversy, on the petition, report of the viewers and the report of the reviewers.

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Metty et al. v. Marsh et al.

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Pending this motion the appellants asked leave to file bonds and several remonstrances to the amended petition, which was denied. Appellants then asked leave to introduce evidence in the cause to prove:

*First.* That said ditch, when constructed, will not be conducive to the public health, convenience or welfare.

*Second.* That the route of said ditch is not practicable.

*Third.* That the costs and expenses of the construction of said ditch will exceed all the benefits that will be derived by the construction of the same; and,

*Fourth.* That the lands of the appellants Lockwood and Hahn will not be benefited by the construction of said ditch.

The court refused to hear such proof, and sustained the motion of the appellee, and entered judgment establishing said ditch.

The court overruled a motion for a *venire de novo*, and also a motion for a new trial.

The appellants jointly assign errors in this court calling in question the several rulings above set forth, and the appellant Lockwood also assigns separate errors calling these rulings in question as to himself alone.

It was in the discretion of the circuit court to permit the appellee to amend his petition in that court. *Coolman v. Fleming*, 82 Ind. 117; *Burns v. Simmons*, 101 Ind. 557; *Williams v. Stevenson*, 103 Ind. 243.

But we think the petition was sufficient without amendment. The statute does not require a particular description of the location of the proposed ditch or drain. The statute requires that the petition shall contain a general description of the proposed starting point, route and terminus of the ditch. The original petition before us contains such description; indeed, in view of the duties to be performed by the viewers, the description in the petition could not be otherwise than general, for it is the duty of the viewers to locate the ditch or drain upon such line as they may deem best to accomplish the object sought, varying from the line described

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*Metty et al. v. Marsh et al.*

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in the petition to such a degree as may be necessary to locate the ditch at a place where it will, in their judgment, accomplish the most good.

We do not think the court erred in overruling the motion to dismiss the original petition, nor do we think it erred in overruling the motion to dismiss the amended petition.

Each of the remonstrances tendered by the appellants in the circuit court was upon the ground:

*First.* That said ditch will not be conducive to the public health, convenience or welfare; and,

*Second.* That the route of said ditch is not practicable.

In addition to these reasons, applicable to all, each of the appellants assigns cause relating to himself alone and affecting the amount of the assessments against his land for the construction of the ditch. No one of these appellants filed, or offered to file, a remonstrance with the board of commissioners of Wells county while the cause was pending in that court.

Section 4295, R. S. 1881, provides that "it shall be lawful for any person interested in the location of said proposed work to file with the board of commissioners, at or before the time set for the hearing of the petition, a remonstrance against the ditch as located by the viewers on and across his lands, by setting forth his grievances therein; and any person deeming his assessment too high, or the damages allowed him too low, may remonstrate for such reasons against the action of the viewers."

Section 4301 provides that "any person or corporation aggrieved thereby may appeal from any final order or judgment of the board of commissioners, made in the proceedings and entered upon their record, determining either of the following matters:

"*First.* Whether said ditch will be conducive to the public health, convenience or welfare.

"*Second.* Whether the route thereof is practicable.

"*Third.* Whether the assessments made for the construction

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*Metty et al. v. Marsh et al.*

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of the ditch are in proportion to the benefits to be derived therefrom.

“*Fourth.* The amount of damages allowed to any person or persons or corporation.”

We are of the opinion that it was the intention of the Legislature that all grievances growing out of the establishment and construction of a ditch like this should be presented to the board of commissioners and settled in that tribunal, where they could be settled cheaply. We are led to this conclusion by the language of the statute, which provides that any party affected by such ditch shall have the right to set forth his grievances by way of remonstrance.

It is urged, however, by the appellants, that the statute makes no provision for remonstrating against the report of the reviewers, and that it follows from this omission that parties aggrieved by such a report have no remedy save by appeal. But we can not give our assent to this view.

In view of the duties to be performed by the board of commissioners, namely, to see that the assessments are made in proportion to the benefits to be derived from the construction of the ditch, we have no doubt as to the power of such board to reject the report of any set of reviewers should it be satisfied that such report was unjust to any of the parties interested.

Such power is to be inferred from the language used in section 4299, R. S. 1881. Under the provision of that section the board is not required to establish the ditch unless it find that such report is in accordance with the provisions of the act under which the proceedings are had.

As one of the leading objects of that act is to secure the payment of the expenses of such ditch by the parties interested in proportion to the benefits to be enjoyed by each, a report which does not secure this object is not in accordance with the provisions of the act, and should be set aside and rejected by the board upon complaint and proof to that ef-

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*Metty et al. v. Marsh et al.*

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fect by any party aggrieved, to the satisfaction of the board before whom the proceeding is pending.

As these appellants each had ample opportunity to file their respective remonstrances with the board of commissioners, and failed and neglected to do so, we think the circuit court properly refused to allow them to be filed on appeal.

Nor do we think the court erred in refusing to hear the proof offered by the appellants pending the motion of the appellee for judgment in his favor.

It has so often been adjudged by this court, in cases analogous to this, that no matter not put in issue before the board of commissioners can be tried on appeal to the circuit court, that but little can be said in elaboration of the principle. *Hardy v. McKinney*, 107 Ind. 364; *Forsythe v. Kreuter*, 100 Ind. 27; *Clift v. Brown*, 95 Ind. 53; *Lowe v. Ryan*, 94 Ind. 450; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Green v. Elliott*, 86 Ind. 53.

We think that the principle announced in the cases above cited applies with full force to the case now under consideration.

It is true that the principle settled by these cases does not apply to questions affecting the jurisdiction of the board, but no question of jurisdiction has been raised on this appeal, except in the motion to dismiss the petition, which we have seen was properly overruled.

As there was no issue for trial, and as the only question going to the jurisdiction of the board of commissioners of Wells county had been disposed of, we think the court did not err in sustaining the appellee's motion for judgment in his favor. *Daggy v. Coats*, 19 Ind. 259; *Kemp v. Smith*, 7 Ind. 471.

The petition, report of viewers, and the report of the reviewers, constituted original papers in the cause, of which the court was bound to take notice as it would of the pleadings in any ordinary cause, and made a *prima facie* case, as held

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in these cases, for the appellee. As the appellants had not seen fit to make any question upon any of these papers, they were not in a condition to destroy the *prima facie* case in favor of the appellee, and there was, therefore, nothing left for the court except to render judgment on the *prima facie* case made by the papers in the cause.

Judgment affirmed, with costs.

Filed Feb. 18, 1890; petition for a rehearing overruled May 16, 1890.

No. 13,138.

THE INDIANAPOLIS AND ST. LOUIS RAILWAY COMPANY v.  
HARMLESS.

**JUDGMENT.**—*Avoidance of.*—*Summons.*—*Pleading.*—In an action on a judgment rendered in favor of the plaintiff by a justice of the peace, an answer by the judgment debtor which alleges that there was not due service of process upon the defendant in the action in which the judgment was rendered, but does not aver that the record does not show due service, is bad.

**SAME.**—*Summons.*—*Exhibit.*—*Pleading.*—The copy of the summons and endorsement can not be considered in aid of such answer, since it is only written instruments which constitute the foundation of the defence that can be properly made exhibits to the answer.

From the Clay Circuit Court.

*J. T. Dye* and *W. H. Dye*, for appellant.

*J. A. McNutt* and *G. A. Knight*, for appellee.

**ELLIOTT, J.**—The complaint of the appellee is founded on a judgment rendered in his favor by a justice of the peace. The appellant filed an answer in two paragraphs. The substance of the first paragraph is this: On the 11th day of August, 1884, Alfred Pell, a constable of Van Buren town-

124	25
131	80
134	25
134	499
134	25
149	558
124	25
159	589

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ship, Clay county, Indiana, in the cause named in the complaint, served process on William Eaglesfield, the agent of the defendant, at Lena, Parke county; the place where the service was made was not in the bailiwick of the constable; on the 24th day of August, James Girton, a justice of the peace, rendered judgment against the defendant. The only service of process made upon the defendant was that made by constable Pell upon its agent at Lena. The defendant did not appear to the action, either in person or by attorney. To this answer a demurrer was sustained.

The appellee's counsel contend that the answer is bad, because it is not averred that the record does not show due service of process. We are required by our decisions to sustain this contention, although if the question were an open one some of the members of the court would agree with the appellant's counsel that where it is shown that there was no legal service of process it is unnecessary to allege that the record does not show such service. But the rule as declared by our cases is that in order to avoid a judgment in a collateral proceeding it must be averred that the infirmity which makes it void appears of record. In *Smith v. Hess*, 91 Ind. 424, it was said: "The general and correct rule, as established by the weight of authority, is, that a judgment by a court of competent jurisdiction is not void, unless the thing lacking, or making it so, is apparent upon the face of the record. If the infirmity do not so appear, the judgment is not void, but voidable." A similar doctrine is declared in many cases, among them *Earle v. Earle*, 91 Ind. 27; *Reid v. Mitchell*, 93 Ind. 469; *Rubush v. State*, 112 Ind. 107; *Harmann v. Moore*, 112 Ind. 221.

It is only written instruments which constitute the foundation of the defence that can be properly made exhibits to the answer, and it is only such exhibits as are properly parts of the answer that aid or strengthen it. Under this familiar rule, declared again and again by our decisions, the copy of

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the summons and the endorsement can not be considered in aid of the answer.

Judgment affirmed.

COFFEY, J., did not participate in the decision of this case.

Filed May 16, 1890.

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No. 14,281.

LEVENGOOD ET AL. v. HOOPLE ET AL.

**WILL.—Construction.—***Estate During Widowhood.*—A testator devised to his wife and heirs, "for her to dispose of as she sees best \* \* \* the tract of land now living on \* \* \* during the time she lives a widow, or in my name. Then said land is to be divided equally amongst the present heirs of David Rupert and Mary, his wife, or the proceeds of the same, as the case may be."

**Held,** also, that the widow having remarried without disposing of said estate, the estate ceased upon said second marriage, and that the land remained for distribution among the children of the appellee and the testator in accordance with the terms of the will.

From the St. Joseph Circuit Court.

*A. Anderson, C. W. Wiley, and T. E. Howard*, for appellants.

*J. L. Hubbard and J. P. Creed*, for appellees.

COFFEY, J.—This was a suit in the St. Joseph Circuit Court for the partition of the land described in the complaint, and, also, to quiet the title to the same as against the appellee Mary Hoople. It appears by the complaint that David Rupert died in the month of November, 1870, seized in fee of the land in dispute, and leaving as his only heirs the appellee Mary Hoople and five children, among whom is the appellant Emma Levengood. At the time of his death the said David Rupert left a will containing the following clause :

124	27
128	12
124	27
137	652
139	72



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Levengood *et al.* v. Hoople *et al.*

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"*First.* I give and bequeath to my wife Mary and heirs, for her to dispose of as she sees best, sell, bargain and convey, as much so as myself in person, to all intents and purposes, in law and equity, as follows, to wit: The tract of land now living on, wheat in ground, grain, such as wheat, corn, rye, or any kind in store, on hand or otherwise, horses, cattle, hogs, sheep, farming implements, harness, all household and kitchen furniture, or any other property whatsoever, that is to say, during the time she lives a widow or in my name. Then said land is to be equally divided amongst the present heirs of said David Rupert and Mary, his wife, or the proceeds of the same, as the case may be."

On the 21st day of December, 1875, the widow, Mary Rupert, intermarried with John O. Hoople, and was at the time of the commencement of this suit his wife.

The whole controversy between the parties to this suit turns upon the construction to be placed upon this clause of the will of David Rupert.

It is contended by the appellants that it was the intention of the testator to vest in his wife, Mary, an estate in the land during her widowhood only, while on the other hand it is contended by the appellee Mary Hoople that it was his intention to vest in her a fee simple upon condition that she should not remarry.

It is settled in this State, both by statute and by the repeated decisions of this court, that where a particular estate is devised to a wife upon condition that such wife shall not remarry, the condition is void, and the estate devised vests and is held the same as if it had not been coupled with the condition. *Coon v. Bean*, 69 Ind. 474; *Stilwell v. Knapp*, 69 Ind. 558.

It is also well settled that the husband may devise to his wife an estate to continue during her widowhood, and that he is not obliged to devise to her a larger estate. *Harmon v. Brown*, 58 Ind. 207; *Tate v. McLain*, 74 Ind. 493; *Wood v. Beasley*, 107 Ind. 37.

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*Levengood et al. v. Hoople et al.*

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We are of the opinion that the will before us falls within the latter class. As we read it, it devises and bequeaths to the appellee Mary Hoople the tract of land upon which she and the testator were living at the date of the execution of the will, together with the personal property named, with power to dispose of the same by sale, bargain or conveyance, as to her might seem best during the time she remained the widow of the testator. In the event of a sale before marriage, she is required, when she ceases to be his widow, to divide what remains of the proceeds among the heirs of herself and the testator; but if she should cease to be his widow before sale, the will requires the property to be equally divided among their heirs. As it is impossible for a living person to have heirs, it is perfectly manifest that the word "heirs" is used in the sense of "children." *Underwood v. Robbins*, 117 Ind. 308.

There is nothing in the will from which it can be inferred that the testator intended to annex any condition to the bequest to the appellee, as in the case where a particular estate is devised subject to termination upon marriage.

It does not follow that because the appellee was given the absolute power to sell and dispose of the property during her widowhood, she took a fee simple estate in the land.

The case falls within the rule announced in the cases of *Clark v. Middlesworth*, 82 Ind. 240, and *South v. South*, 91 Ind. 221.

The will vested in the appellee an estate in the land in controversy during her widowhood, coupled with an absolute power to sell and dispose of the same during the continuance of her estate, and had she sold and conveyed the land during that period doubtless the purchaser would have acquired a good title. This, however, she did not do, and as her estate ceased upon intermarriage with her present husband, the land remains for distribution among the children of the appellee and the testator in accordance with the terms of the will.

It follows from what we have said that the court erred in

*Reisterer et al. v. Carpenter.*

sustaining the demurrer to the second paragraph of the complaint of the appellants, which proceeds upon the theory that the estate of the appellee Mary Hoople terminated upon her second marriage.

Judgment reversed, with directions to overrule the demurrer of the appellee to the second paragraph of the complaint, and for further proceedings not inconsistent with this opinion.

Filed May 16, 1890.

124	30
128	537
124	30
157	506
157	507

No. 14,207.

**REISTERER ET AL. v. CARPENTER.**

**ATTORNEY'S FEE.**—*Promissory Note.*—*Action on.*—The sum of \$60 is not an unreasonable attorney's fee in a suit upon a promissory note where tender is made of \$510 and after trial the sum of \$968.49 is recovered.

**CONTRACT.**—*Parol Evidence to Vary.*—Parol evidence is inadmissible to prove that a written contract is different from what the writing states it to be.

**SAME.**—*Contractual Consideration.*—*Parol Evidence.*—Where the consideration of a contract is contractual it can not be varied, changed or modified by parol evidence.

From the Fountain Circuit Court.

*T. F. Davidson*, for appellants.

*H. H. Dochterman*, for appellee.

**BERKSHIRE, J.**—This was an action upon a note which provides for attorney's fees. After issue joined the cause was submitted to the court for trial, and a finding returned in favor of the appellee, who was the plaintiff below, for \$968.49. And after a motion for a new trial had been filed, and overruled, to which ruling of the court the appellants reserved an exception, the court rendered judgment that the sum of \$510, which the appellants had brought into court

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*Reisterer et al. v. Carpenter.*

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as a tender, be paid to the appellee, and that he recover of the appellants the further sum of \$458.49, together with costs.

The only ruling of the court upon which error is predicated is the overruling of the motion for a new trial.

The two causes assigned in the motion for a new trial, which are relied upon, are: (1) that the damages are excessive, and (2) that the court erred in excluding certain testimony offered by the appellants.

The court allowed the sum of \$60 as a reasonable fee for appellee's attorneys, and it is contended that this was too much in view of the evidence before the court as to the value of the services rendered.

We are not inclined to this opinion. It is true, that after the appellants had brought into court the said sum of \$510, as a tender, the contest was over the balance of \$468.49, as claimed by the appellee; but when the action was brought the amount which the appellee claimed to be due him, less attorney's fees, was \$918.49.

The action was closely contested after the tender was made, and the labor, diligence and legal ability required equally great as if the contest had been over the whole sum, and the responsibility nearly the same.

In view of the amount involved, the issues and trial, we are not of the opinion that the fee was unreasonably large; it might have been more and not have been excessive. This leads us to the second proposition.

Certain questions were propounded to one Marshal Nixon, a witness called and placed on the witness-stand by the appellants, to which questions the appellee interposed objections.

The objections were sustained by the court. The appellants then informed the court what they proposed to prove by the witness in answer to said questions. The court refused to permit the witness to answer the questions, and the appellants reserved exceptions.

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*Reisterer et al. v. Carpenter.*

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There were several paragraphs of answer under which the appellants claimed that the testimony offered was competent. These paragraphs of answer covered the same subject-matter exactly, and the questions propounded all related to the same transaction, and by them the appellants sought to elicit the same facts.

In each of the said paragraphs of answer it was alleged that the said Marshal Nixon was the owner of certain personal property which he delivered to the appellee, and that in consideration therefor the appellee agreed to dispose of the property by sale or otherwise, and out of the proceeds thereof pay the following indebtedness of the said Marshal Nixon: \$2,000 due to the First National Bank of Attica, Indiana, \$700 due to the appellee, \$404.40 due to the appellants, and a debt due to one George W. Paul, the amount of which is not stated; that said property was worth \$7,000, and that the appellee realized that amount therefor.

Counsel for the appellants contends, among other things, that the relation of mortgagor and mortgagee existed between the said Nixon and the appellee, but the facts averred in neither paragraph of the answer present that question.

The appellee, according to the averments, was to take the property and sell or otherwise dispose of it, and out of the proceeds pay the indebtedness. What was to be done with the surplus, if there was one, we are not informed.

The transaction, as averred, did not simply create a lien in favor of the appellee to secure his debt, nor did it create a lien or security as to the other debts named.

If the appellee, by the arrangement which was made, had assumed the position of a mere lien-holder, he could only have disposed of the property by summary sale after notice given, or by a foreclosure in some court having jurisdiction. But according to the arrangement as averred in the pleadings, the property passed into the possession of the appellee with power to sell it and vest a good title in the purchaser, and to receive and distribute the proceeds.

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The offered testimony was in support of the answers, and not different from the facts therein alleged. The relation that existed between the parties must have been that of vendor and vendee, or trustee and *cestui que trust*.

As none of the paragraphs of answer alleged that the contract between the said Nixon and the appellee was in writing we are compelled to assume that it rested in parol.

At the time the appellants made their several offers as to what they would prove by the said witness Nixon if he was permitted to answer the questions propounded, the court had before it the following written contract, which it was conceded had been entered into between the appellee and said Nixon at the time the appellee acquired whatever right, title, or ownership he did acquire to the said property :

“ This agreement, made this day by and between Marshal Nixon, party of the first part, and Sampson Carpenter, party of the second part, witnesseth : That the party of the first part has this day sold and transferred to the party of the second part, for the consideration hereinafter mentioned, the following property, to wit, at Melott's Station, on the Range road, one frame building, called office-room, one pair large scales, corn-cribs and sheds ; all the corn in said cribs ; all lumber, lath, shingles, and building materials, agricultural implements, and all personal or other property that the party of the first part may own at said station, but the party of the first part does not attempt to sell or convey any of the real estate on which said office, cribs or sheds are situate, which land belongs to said railroad company ; for and in consideration for said property the party of the second part agrees to pay a certain promissory note payable at the First National Bank of Attica, Indiana, which note is for the sum of \$2,000, due September 30th, 1883, and is signed by C. W. Newlin and Marshal Nixon, and for a further consideration for said property the party of the second part

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agrees to pay a certain promissory note executed by said Nixon and Carpenter to the First National Bank of Attica, Indiana, which last note is for the sum of \$900, and is the only note signed by said Carpenter and payable at said bank ; and it is further agreed that if the said Carpenter fails to pay said notes when due, and any costs or charges accrue thereon by suit or otherwise by reason of the non-payment thereof, then the said Carpenter agrees to refund and pay all said costs and charges. This September 24th, 1883.

“ MARSHAL NIXON.

“ SAMPSON CARPENTER.

“ JOHN F. REISTERER, *Witness.*”

It was also conceded that all of the oral negotiations and stipulations of which the appellants offered to make proof were antecedent in time to the execution of said written contract.

We are of the opinion that whatever interest the appellee acquired in and to the property described in the written contract he acquired thereby, and not otherwise.

The only exception to the universal rule which will not allow a written instrument to be contradicted, modified or varied by parol evidence, is that a deed or bill of sale purporting to convey or transfer an absolute title may by parol evidence be given the force and effect of a mortgage.

The ruling of the court excluding the offered evidence was therefore proper, for the reason that by the offered testimony the appellants were seeking to show that the contract between appellee and Nixon was different from what the writing stated it to be, and was therefore but an effort to contradict or impeach it. But the answers ignore the writing, and hence the offered evidence was not within the issues if the evidence would otherwise have been competent.

It is well settled, as contended by counsel for the appellants, that parol evidence is admissible to show the real consideration for an obligation or contract though it be different from the recital in the contract. But an exception to this

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rule is where the consideration stated is contractual. In such case the consideration can no more be varied, changed or modified by parol evidence than can any other of the terms or conditions of the contract. *Pickett v. Green*, 120 Ind. 584; *Carr v. Hays*, 110 Ind. 408; *Cónant v. Nat'l State Bank*, 121 Ind. 323; *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334; *Hubbard v. Marshall*, 50 Wis. 322; *Hinckley v. New York Central R. R. Co.*, 56 N. Y. 429; *Henry v. Henry*, 11 Ind. 236; *Van Wy v. Clark*, 50 Ind. 259; *Cocks v. Barker*, 49 N. Y. 107.

In the written contract before us the consideration to be paid by the appellee is contractual, and can not be varied or controlled by parol testimony. It is a specific and direct promise to do certain things. His agreement is to pay Nixon's notes held by the bank, or its assignee. This he is bound to do, and if he fails he becomes personally liable to whoever holds the paper.

We recognize the rule to which our attention has been called, that two independent contracts may be entered into at the same time, one of which may be reduced to writing and the other left to rest in parol, and that both may be enforced the same as if they had been entered into at different times.

Suppose A. contracts with B. to build for the latter a house at and for the price of \$1,000, and the contract is then and there reduced to writing. At the same time A. sells B. a horse for the price of \$100, to be paid in six months. The subject covered by one of the supposed contracts is in no way connected with the subject of the other; they are as independent and distinct as though made years apart; and no good reason, we think, can be urged why the enforcement of the one should be prejudiced because of the existence of the other. In the case supposed it is true that the question might arise as to whether the contracts were separate and distinct; but in fact so, it is clear that they could be enforced independent of each other. But we have no such



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case as that before us; here, there is but one subject-matter, and but one contract, and the only question is, what are the rights of the parties under the contract?

We find no error in the record.

Judgment affirmed, with costs.

Filed May 16, 1890.

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No. 13,963.

RAPP v. REEHING ET AL.

124	36
127	44

**WILL.**—*Execution of on Sunday.*—*Validity.*—*Sunday Law.*—A will executed on Sunday is valid. The drafting and execution of a will on Sunday do not come within the definition of "common labor," so as to be prohibited by section 2000, R. S. 1881, making it a penal offence to be found engaged in common labor, or in one's usual avocation on that day.

**SAME.**—*Contradiction of its Terms.*—*Extrinsic Evidence.*—Extrinsic evidence is inadmissible to contradict the terms of a will, or to show that the testator's intention was different from that therein expressed.

From the Allen Circuit Court.

*S. R. Alden*, for appellant.

*P. B. Colerick* and *W. G. Colerick*, for appellees.

**OLDS, J.**—This was an action by the appellant against the appellees to contest the will of Christian Gottlieb Rapp, deceased. The errors assigned are the rulings of the court in sustaining demurrers to the second and third paragraphs of appellant's complaint. The first paragraph of complaint having been withdrawn, there was a judgment on the demurrer for the appellees.

The second paragraph alleges that the will was executed on Sunday, and alleges facts showing that the will might have been executed upon some other day of the week, and that there was no necessity for the execution of the will upon

Sunday ; that the testator was, and had been, for a period of time prior and subsequent to the execution of said will, in a condition, both physical and mental, to have executed a will, and that, as a matter of convenience, he arranged with his attorney who drafted the will, and a friend, to come to his (the testator's) house on Sunday and draft the will, and the will was drafted and written by the attorney, and executed by the testator on Sunday. This paragraph presents the question as to the validity of a will executed on Sunday without any unusual circumstances or special necessity having existed for its execution upon that particular day. It is contended by counsel for appellant that a will executed upon Sunday is void, unless it be shown that some unusual circumstances existed making a necessity for its execution upon that day ; that the drafting and execution of a will come within the definition of common labor, and are prohibited by section 2000, R. S. 1881, which provides that "Whoever, being over fourteen years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarrelling, at common labor, or engaged in his usual avocation (works of charity and necessity only excepted), shall be fined in any sum not more than ten nor less than one dollar ; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travellers, families removing, keepers of toll-bridges and toll-gates, and ferrymen acting as such."

It is contended that a broad construction should be given to the words "common labor" and "usual avocation," so as to include the drafting and execution of a will, and that such has been the construction placed upon the statute by this court, by holding that contracts and bonds, and even church subscriptions come within the term "common labor," and their execution prohibited on Sunday, and are therefore invalid unless afterwards ratified.

We are unable to agree with the theory of counsel. There is a wide distinction between the execution of contracts, notes

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*Rapp v. Reehling et al.*

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and bonds on Sunday and the execution of a will; the former are instruments executed in the common every day affairs of life in the usual course of business; they create a liability from one person to another; they are the foundation of, or a necessity for their execution arises out of, business transactions.

It is not so in regard to a will; its execution is the voluntary act of the testator. It may be revoked or changed in a proper manner at his discretion. It provides for the disposition of the testator's estate after his death. It might be said to have some elements of sacredness about it. It is executed in anticipation of the death of the testator, and is to take effect at his death and be operative thereafter. One of its prime objects is to enable the testator to provide in a proper manner for those who are the objects of his bounty; giving to those who need and who ought to receive his bounty, but who would not were it not for the right of testamentary disposition of property. By the execution of a will the testator is also enabled to aid in continuing and building up institutions of charity and learning which could not be done by other methods requiring a surrender of the full control of one's property during life, and these objects, accomplished by means of testamentary disposition of property, are entitled to be treated with some degree of sacredness and respect; but if the drafting and execution of a will could be said to fall within the term "common labor," yet there would at all times exist a necessity for the immediate execution of a will.

The law recognizes the right of persons to make a testamentary disposition of their property by will, and to make such disposition while in life and possessed of sufficient mental capacity to make a will, and the only certainty of being able to make such disposition of one's property is to do so instantly, when one is possessed of his faculties. Death is certain, and life is uncertain. One has no lease of life or his

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*Rapp v. Reehling et al.*

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mental faculties ; either may be extinguished instantly, and the only security one has of being able to execute a will and dispose of his property in the manner in which he may desire is to do so when in the possession of his faculties, and the uncertainty of life creates a constant necessity, and presents to one's mind the uncertainty of being able to provide for those who are near to him, and are the objects of his bounty, or making provisions for and aiding in the perpetuation of those institutions in which he is interested, and which are sacred to him and beneficial to the public interests, if the making of the will be delayed. The drafting and execution of a will are akin to the execution of a marriage contract and the solemnizing of the marriage. It may as well be said that the minister while engaged in solemnizing a marriage is engaged in common labor, or at his usual avocation, as that the lawyer who drafts a will is so engaged, as the minister evidently is engaged in the solemnizing of marriages more frequently than the lawyer is engaged in the writing of wills.

The statute makes it a penal offence to be found engaged in common labor or engaged in one's usual avocation. It certainly would not be contended that a minister of the gospel, engaged in solemnizing a marriage on Sunday, or a lawyer engaged in writing a will to be executed on Sunday, would be subject to indictment and prosecution for a violation of the statute, and yet if either comes within the prohibition of the statute they would be liable to a criminal prosecution, and the one is evidently as much a violation of the statute as the other. The one act is the solemnizing of a contract whereby two persons are joined together and become members of one family by the bonds of holy wedlock, whereby they both become members of one household, a contract and union in which society is interested. The other is engaged in the execution of a will providing for the members of his household. The law, it is true, provides for a distribution of property, but oftentimes the relationship or

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Rapp v. Reehling *et al.*

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the circumstances are such that the law does not make a proper or equitable provision, and in such cases the purpose of a will is a sacred one, making proper provision for the members of the testator's household, or the persons who are the objects of his bounty and dependent upon him for support, and not so related as that the law would cast his estate upon them. Possibly unjust wills may be made, but that does not affect the right to make a will.

It seems clear to us that the drafting and execution of a will do not come either within the letter or spirit of the statute hereinbefore referred to. It is not an act commonly done, but rather an uncommon act to execute a will. It is rare that a person who dies possessed of property disposes of it by will, and those who do seldom make more than one during a lifetime. Occasionally one revokes a will and makes a new one, or adds a codicil, but testamentary disposition of property is an exception to the usual mode in which the title to property passes from one to another, and certainly no desecration of the Sabbath existed on account of the day being occupied for that purpose. No evil tendencies were growing out of such work on the Sabbath day which required legislation to correct; but we are not required to pass upon the question without authority, as the courts of other States have passed upon the same question, and held that a will executed on Sunday is valid. *Bennett v. Brooks*, 9 Allen, 118; *Beitenman's Appeal*, 55 Pa. St. 183; *George v. George*, 47 N. H. 27.

The third paragraph of the complaint, as we construe it, alleges a mistake in the will; that by mistake of the scrivener or translator of the will it was not written as the testator intended; that he did not intend, or wish or will to give the one-half of his estate to the persons named to whom it was devised and bequeathed in the will, but intended to give it to other persons. These averments seek to contradict the terms of the will, or to show that the testator's intention was different from that expressed by the will. This

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Davis v. Fogle et al.

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can not be done. *Bunnell v. Bunnell*, 73 Ind. 163; *McAlister v. Butterfield*, 31 Ind. 25; *Grimes v. Harmon*, 35 Ind. 198.

There is no error in the record.

Judgment affirmed, with costs.

Filed Feb. 26, 1890; petition for a rehearing overruled May 16, 1890.

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No 15,040.

124	41
132	304

DAVIS v. FOGLE ET AL.

**WILL—Revocation.—Adoption of Child.**—The adoption of a child, under the statute of this State, does not operate to revoke an antecedent will of the adopting father, although he has made no provision by the will or otherwise for such adopted child. By section 2560, R. S. 1881, the revocation of a will is not contemplated upon the adoption of a child.

From the Noble Circuit Court.

*J. Morris, J. M. Barrett and T. M. Eells*, for appellant.

*H. G. Zimmerman, F. M. Prickett and P. V. Hoffman*, for appellees.

OLDS, J.—This was an action to quiet title to real estate. William C. Davis, who died on the 11th day of April, 1889, was, at the time of his death, the owner in fee of the real estate described in the complaint. The appellant, Esther S. Davis, was the third, and childless wife of the deceased. The deceased had no children by his first wife. The appellee Mina A. Fogle was his child by the second wife. In 1888 said William C. Davis adopted Eli C. Davis as his child and heir. After the marriage of said William C. Davis to his third wife, Esther S. Davis, and before the adoption of Eli C. Davis, he made a will devising the real estate in controversy to his wife, Esther S. Davis, in fee. The appellee Mina A. Fogle brought this suit, making Esther S. and Eli

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*Davis v. Fogle et al.*

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C. Davis defendants, alleging the facts, and contended that the adoption of Eli C. Davis by her father, William C. Davis, revoked the will, and that she and Eli C. each inherited a one-half interest in the real estate, subject to the life estate in favor of Esther S. Davis, the third and childless wife of the deceased.

The appellant, Esther S. Davis, demurred to the complaint, for the want of facts, which demurrer was overruled and she excepted.

The question presented for decision is, does the adoption of a child, under the statutes of this State, operate to revoke an antecedent will of the adopting father, he having made no provision, by the will or otherwise, for such adopted child? This question must be determined mainly by the construction to be given to our statutes.

Counsel for appellee, in their able brief in this case, contend that as "the statute declaring and defining the rights and interests of adopted heirs in the estate of their father, contains no limiting or qualifying words; nor are the rights and interests of the adopted heir restricted to the rights and interests of a 'natural heir' in any particular case or class of circumstances; nor to natural heirs born prior to the date of the will of their father, whereby no provision has been made for them, but the wording is that the adopted child shall be entitled to and receive all the rights and interests in the estate of such adopting father, by descent or otherwise, of a natural heir, and as the legal status, rights and capacities of an adopted heir are, by the statute, made co-equal with those of a natural heir, then co-ordinate legal consequences and results must of necessity flow therefrom; hence, if the natural birth of an heir subsequent to the date of its father's will (no provision having been therein made for such heir) shall be deemed a revocation of the will of its father, so, also, the legal birth of an heir subsequent to the date of its father's will (no provision having been therein made for such heir) shall

in like manner, be deemed to work a revocation of its father's antecedent will."

So much of the statute providing for the adoption of children as is material reads as follows:

"Such court, when satisfied that it will be for the interest of such child, shall make an order that such child be adopted; and from and after the adoption of such child, it shall take the name in which it is adopted, and be entitled to and receive all the rights and interest in the estate of such adopted father or mother, by descent or otherwise, that such child would do if the natural heir of such adopted father or mother." Section 825, R. S. 1881.

It is further provided that if such child shall die without leaving wife or husband, issue, or their descendants surviving him or her, seized of any real estate or personal property which may have come to such child by gift, devise, or descent, from such adopting father or mother, such property shall descend to the heirs of such adopting father and mother the same as if such child had not been adopted. Elliott's Supp., section 29.

It is held by this court that where an adopted child dies without issue, owning real estate which came to it by inheritance from its adopting father or mother, the same shall descend, on the death of the child, to the adopting father or mother surviving, in preference to the natural mother. *Humphries v. Davis*, 100 Ind. 274; *Humphries v. Davis*, 100 Ind. 369; *Paul v. Davis*, 100 Ind. 422.

The court in the case of *Humphries v. Davis*, *supra*, at p. 282, say: "Not only is the conclusion which we have stated that to which cold rules of logic and the benign ones of natural equity lead, but it is also the conclusion to which the general principles both of the American law and the Roman law lead. It is a principle of both systems of jurisprudence, that in case of failure of descendants capable of taking, the inheritance shall go back to the kinsmen of the blood from which it came. Our statute fully recognizes this general principle,



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for it provides that when the inheritance comes from the paternal line, it shall go back to the kinsmen of that blood, but when the inheritance comes from the maternal line it shall go back to the kinsmen of the mother's side." These decisions go as far, it would seem, in holding the legal status of the adopted child to be the same as a natural child, as is warranted under the statute; but the conclusions are reached on broad, equitable principles, and differ very materially from the questions presented in this case. These decisions go no further than to hold that the surviving adopting father or mother inherits from the adopted child such property only as it inherited from the deceased adopting father or mother, and the statute was so amended in 1883 (Elliott's Supp., section 29), as to provide that property which may come to such adopted child by descent, devise, or gift, from its adopting father or mother shall, upon its death without husband, wife, or issue surviving, descend to the heirs of such adopting father or mother; which amendment was no doubt deemed necessary to prevent the natural heirs of such adopted child from inheriting to the exclusion of the heirs of its adopting parents that which came from them, and of right should on the death of such child without husband or wife, issue or descendants surviving, descend to the heirs of the adopting parents. There is a material difference in the matter of inheritance by an adopted and natural child; also, as to the descent of property owned by them. An adopted child inherits from its natural parents, but not from the relatives of the adopting parents. The natural parent inherits all such property as the child may acquire otherwise than through the adopting parents. In the case of *Humphries v. Davis*, *supra*, p. 283, it is said by the court: "It does her [the mother] no injustice to leave her with her right to such property as her child may acquire otherwise than through the adoptive parents, but it would do great injustice to permit her to secure the property acquired by her child in virtue of both its natural and adoptive rights."

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But we think the statute relating to the revocation of wills is decisive of the question involved in this case. Section 2559, R. S. 1881, provides: "No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed, subscribed, and attested as required in the preceding section. And if, after the making of any will, the testator shall execute a second, a revocation of the second shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it, or, unless after such revocation, he shall duly republish the previous will." Section 2550 provides that "If, after the making of a will, the testator shall have born to him legitimate issue, who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue."

It is held in *Runkle v. Gates*, 11 Ind. 95, that to revoke a will the requirements of the statute must be strictly pursued. It is manifestly true no act, thing, or deed will revoke a will once duly executed, unless it comes within the provisions of the statute providing for the revocation of wills. To hold that the adoption of a child revokes the will, it is necessary to interpolate into section 2560, after the words "legitimate issue," the words "or shall adopt a child;" or words to the same effect, for the words of the statute are plain and explicit; they are: "If after the making of the will the testator shall have born to him legitimate issue." It would be legislation, and enacting a statute to so construe it, and would be putting an unwarranted construction upon the statute to hold that the words "the testator shall have born to him legitimate issue" mean the same as, or include, an adopted child; or that by the adoption of a child a parent has born to *him*, or her, legitimate issue. The one is made

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*Davis v. Fogle et al.*

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a legal heir by legal proceedings under the statute, and the other is an heir by reason of being born in lawful wedlock. For one, the parent has natural love and affection; for the other the parent may, or may not, have. The one the parent is bound to by nature, and under moral obligation to support, maintain, educate, and provide for; and to the other the parent is under such obligations as the statute imposes, and none other. The statute gives to the one certain rights, and imposes certain obligations on the adopting parents, but it does not make it the legitimate child and issue of the adopting parents, or a child born to them. One becomes an heir by birth, the other by the judgment of a court.

By section 1 of an act approved March 11, 1889 (Acts of 1889, p. 430), it is provided "that if a man marry a second or subsequent wife and has by her no children, but has children alive by a former wife, the interest of such second or subsequent childless wife in the lands of the decedent shall only be a life-estate, and the fee of the same shall at the death of such husband vest in such children, subject only to the life-estate of the widow." It might as well be claimed that if, during the lifetime of such second, or subsequent wife, the husband and wife adopt a child, it would be the same as if one were born to them, and such wife would inherit the one-third in fee of the real estate owned by the husband, since, if a child was born to them as the fruits of the marriage she would inherit, and the birth of the legitimate child fixes the status of the wife as to her interest in the property of her husband; and if, as contended by counsel for appellee, the status of an adopted child is the same in law as a child born in wedlock, and possesses the same rights as a child born in wedlock, and the adoption revokes an antecedent will the same as the birth of a child, then, with equal force can it be said that the status and rights of the parents are fixed by the adoption of a child the same as by the birth of a child. As well might it be said that if the father die testate, and devise his real estate to his daughter for life, and

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the fee to the heirs of her body, in case she shall have issue born to her, but in case she shall have no issue born to her then the fee to a son, if the daughter adopt a child it would take the fee in the real estate the same as if it were a natural child, born of her body. These illustrations legitimately flow from the theory contended for by counsel for appellee in the construction of section 2560, if carried to a reasonable extent, and, we think, are clearly erroneous, and can not be supported by authority.

We have examined the authorities cited by counsel for appellee, and think none of them sustain the doctrine contended for. The case of *Sewell v. Roberts*, 115 Mass. 262, is based upon a statute somewhat different from the statute of this State, and the decision goes no further than to hold that the adopted child took as the heir of the adopting father. The statute under which the adoption was made provided that the adopted child, for the purpose of inheritance, etc., should be the same as if born to them in lawful wedlock, except in certain cases; and the court held that the case under consideration did not come within any of the exceptions named in the statute, and it is far from being decisive of the question presented in this case.

It seems clear to us that the adoption of a child does not revoke an antecedent will of the adopting parent; that it can not be construed to operate the same as the testator having *born to him legitimate issue*.

The court erred in overruling the demurrer to the complaint, and the judgment must be reversed.

Judgment reversed, with costs.

Filed March 11, 1890; petition for a rehearing overruled May 15, 1890.

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 Miller v. Curry et al.
 

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No. 14,228.

## MILLER v. CURRY ET AL.

194	48
136	385
124	48
147	677

**QUIETING TITLE.**—*Disclaimer.*—*Pleading.*—In an action to quiet title it is not error to overrule a demurrer to an answer by the defendants, who are not in possession, which disclaims any interest in the real estate in controversy and alleges that the defendants had never claimed any interest in the land.

**MORTGAGE.**—*Permanent Improvements by Mortgagee.*—*Recovery for.*—*Repairs.*—Where one goes into possession of land under a deed absolute upon its face, but which is, in fact, a mortgage, believing, in good faith, that he is the owner of the land, and makes permanent improvements thereon, he is not entitled to recover for the value of the improvements, but may recover for the value of repairs.

From the Wells Circuit Court.

A. N. Martin, for appellant.

E. R. Wilson and J. J. Todd, for appellees.

ELLIOTT, J.—The appellant's complaint contains several paragraphs; the first is to quiet title, and the others allege that the appellant executed to Amos Curry, in his lifetime, an instrument, in form a deed, but which was in fact a mortgage. Elizabeth Curry, Mary Studabaker and Edwin R. Wilson filed an answer disclaiming any interest in the real estate in controversy, and alleging that they had never claimed any right, title to, or interest in it.

It is asserted by appellant's counsel that the court erred in overruling her demurrer to these answers, but counsel are in error. If it is true, as the demurrer admits, that the defendants had never claimed an interest in the land, the appellant had no cause of action against them. Their disclaimer fully answered a material allegation of the complaint, and was sufficient to defeat the action; for, if they had never claimed title, the plaintiff had no cause of action against them. The case is unlike that of a party in possession who, without denying or yielding possession, simply disclaims title. *McAdams v. Lotton*, 118 Ind. 1.

The material questions in the case arise on the special findings of fact made by the court, and the conclusions of law stated thereon, for the findings clearly show on what pleadings the cause was tried and the judgment rendered; so that if it were conceded that there was error in overruling the demurrer to the second paragraph of the answer for the reason that it professed to answer all of the paragraphs of the complaint, but did not, in fact, answer the first paragraph, the judgment could not be reversed, because it affirmatively appears that the ruling did not affect the merits of the case.

The facts contained in the special finding are, in substance, these: In November, 1876, the appellant became the owner of the real estate in controversy. On the 6th day of September, 1877, John W. Kenagy recovered a judgment against her, which became a lien on the real estate; on the 5th day of February, 1878, the Singer Manufacturing Company recovered a judgment against her; on the 13th day of January, 1879, Studabaker and Wiley recovered a judgment against her, and on the 17th day of November, 1879, Samuel Pemberton also recovered a judgment against her. Executions were issued on all of the judgments, and the appellant claimed the real estate as exempt from execution; but, notwithstanding her claim, the property was sold and she redeemed it from the sale. The property was sold for taxes at various times, and deeds issued to the purchasers. On the 3d day of February, 1883, Amos Curry lent to the appellant four hundred dollars, and to secure the payment of the money borrowed she executed to him a deed, absolute on its face; Curry, at the same time, executed a written agreement wherein it was recited that he had advanced four hundred dollars to the appellant, and promised to execute a quitclaim deed to Mary J. English in the event that the money lent to the appellant was paid within ninety days. On the 7th day of March, 1883, the appellant executed to Curry another

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*Miller v. Curry et al.*

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quitclaim deed for the property; Curry, at the same time, agreed in writing to reconvey the real estate to the appellant upon the payment of the money lent to her and paid out for her. At the request of the appellant Curry paid to the holder of one of the tax-deeds \$200, and received a quitclaim deed, and he also paid other tax claims and liens by her direction. Curry took possession of the land in October, 1883, and continued in undisturbed possession until the 17th day of September, 1885. While he was in possession he made valuable and permanent improvements; all of the improvements were made by him in good faith, and in the belief that he was the owner of the land. The rental value of the land was fifty dollars per year. On the 17th day of September, 1885, Curry died, leaving a will, which was duly admitted to probate, and Hugh Dougherty appointed administrator with the will annexed. Amos Curry devised the real estate in controversy to his son, David F. Curry, and provided that all property devised to his son David F. should be placed in the hands of trustees. Hugh Dougherty and David Studabaker were duly appointed such trustees, and are now in possession of the property. On the 21st day of November, 1885, the appellant demanded a reconveyance of the land, but the parties refused to reconvey. At various times the appellant paid Amos Curry sums of money, aggregating four hundred dollars. The conclusions of law stated are, in substance, these:

1st. The instruments executed to Amos Curry by the appellant are mortgages, and not absolute deeds of conveyance.

2d. The judgments mentioned in the finding of facts are liens on the land in the hands of Hugh Dougherty, the administrator and trustee, and David Studabaker, trustee.

3d. Dougherty, as administrator, is entitled to the value of the improvements made by Curry while in possession, and he is also entitled to a lien for the money paid to the appellant, and for the money paid for her.

4th. The appellant is entitled to a decree quieting her title against the appellees, except as to the sum of \$1,080, that being the amount of the money paid to the appellant, and paid for her upon judgment and tax liens, and for improvements and repairs.

The questions with which we are concerned are such only as affect the rights of the appellant, as there is no controversy between the appellees. If, therefore, the conclusions of law and the judgment are correct as to the appellant, the judgment must be affirmed, as no question as to the rights of the appellees between themselves is before us.

We have no doubt that the land was bound for the money paid to the appellant, and paid upon the judgment liens and for taxes. This would be so even if the appellant had not authorized the payment of such liens, for the mortgagee had a right to pay them to protect his title, and upon payment he acquired a lien under his mortgage. Thus far the case is free from difficulty, but upon the question as to whether the mortgagee was entitled to compensation for improvements made while in possession, there is some difficulty.

The trial court rightly decreed that the instruments executed by the appellant were mortgages. *Voss v. Eller*, 109 Ind. 260; *Hanlon v. Doherty*, 109 Ind. 37. As they were mortgages in the beginning, so they continued, for "Once a mortgage, always a mortgage." It is true, that the maxim which we have quoted is not always applicable, nor is it, indeed, to be taken as anything more than a concise expression of a very general rule; but it applies in this case, for there is nothing which takes the case out of the ordinary general rule. There was no cancellation of the indebtedness or release of the judgment and tax claims, so that the mortgages continued as securities for the payment of those claims, as well as for the sums of money paid directly to the mortgagor.

As the instruments upon which the claim of the appellees is based are mortgages, they possess, notwithstanding their form, all the incidents of mortgages. *Voss v. Eller*,



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*supra*. Their effect was never changed, for the reason that there was no agreement extinguishing the indebtedness and releasing the debtor. Had there been such an agreement a very different question would be presented.

The instruments, although absolute on their face, were, as we have already said, in fact mortgages, and as the grantee took possession under them it must follow that he took possession as mortgagee. It can make no difference that he believed, in good faith, that he was the owner of the land, for the contract which gave him the only right he could possibly have, made him a mortgagee, and not an owner. His mistake was one of law and not of fact, and that mistake can not affect the rights of the mortgagor. If he had no title as owner, but did have one as a mortgagee, it certainly results that his possession was that of a mortgagee.

We must regard Curry as a mortgagee in possession, and not as an owner, and the question, therefore, is, is he entitled, as mortgagee, to compensation for improvements made by him while in possession? This question is not determined by the case of *Catterlin v. Armstrong*, 79 Ind. 514, nor by the case of *Gaskell v. Viquesney*, 122 Ind. 244; for here the question arises between the mortgagor and the mortgagee in possession, so that the question is radically different from that presented in the cases to which we have referred.

The general rule unquestionably is, that a mortgagee in possession has no right to make improvements at the expense of the mortgagor, although he may make repairs when required to preserve and protect the mortgaged premises. Mr. Jones thus states the rule. Speaking of the mortgagee he says: "He has no authority to make the estate better at the expense of the mortgagor, but is bound to use reasonable means to preserve the estate from loss and injury." 2 Jones Mortgages (4th ed.), section 1126; see, also, section 1127, and note.

There may, perhaps, be exceptions to the general rule, but

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the facts stated in the special finding do not carry this case out of that rule.

The trial court erred in allowing the appellees the value of the improvements made by Curry while in possession, but it did not err in allowing the value of the repairs.

Justice requires that a new trial should be awarded to the appellant; the judgment is therefore reversed, with instructions to the circuit court to grant a new trial, as to the appellees other than those named below, and to proceed in accordance with this opinion.

The judgment is affirmed as to the appellees, Elizabeth Curry, Mary Studabaker, and Edwin R. Wilson, at the costs, as to them, of the appellant.

Filed April 30, 1890.

#### ON PETITION FOR A REHEARING.

ELLIOTT, J.—It is insisted by the appellees' counsel that we were in error in holding, as we did, that the appellees having entered into possession as mortgagees were not entitled to recover for permanent improvements made by them. We have given the able and courteous argument of counsel careful consideration, and are strengthened, not shaken, in our former conclusion.

Counsel refer us to 2 Jones Mortgages, section 1128, where it is said: "When the mortgagee makes permanent improvements, supposing he has acquired an absolute title by foreclosure, upon a subsequent redemption he is allowed the value of them." This statement of the law was not controverted by us, for we could not deny it without wandering from the case presented by the record, for here there was no decree of foreclosure. All that the appellees' ancestor had was a naked mortgage, and under that he entered into possession.

In the case of *Mickles v. Dillaye*, 17 N. Y. 80, there was a decree of foreclosure, and it was by virtue of the decree that the plaintiff entered, so that the decision there made is

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 Catalani et al. v. Catalani.
 

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not at all relevant to the case before us. In that case the general rule was declared as we declared it, the court saying: "Where the conventional relation of mortgagor and mortgagee is shown and acknowledged between the parties, there is no reason why the latter should be allowed to obstruct the right of redemption by expending money upon improvements."

The case of *Green v. Dixon*, 9 Wis. 485, is not in point, for in that case there was a decree of foreclosure, and the mortgaged premises had passed into the hands of an innocent purchaser.

We regret that we can not comply with the appellees' request and determine the case upon the special findings by directing a *remititur*, but we are unable to do so because the case was tried upon an erroneous theory. If the appellees should show, on a new trial, that the debt secured by the mortgage was paid or released they may fully succeed; but we can not go back to the evidence in the face of the special findings to determine that question.

The appellees who disclaimed, and against whom this appeal has failed, must, of course, recover costs.

Petition overruled.

Filed May 17, 1890.

124	54
128	49
194	54
186	142
186	243
124	51
137	215
139	579

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 No. 14,294.

### CATALANI ET AL. v. CATALANI.

**STATUTE OF FRAUDS.—Real Estate.—Verbal Promise to Reconvey.—Parol Evidence to Establish a Trust.**—A widow, the owner in fee of certain real estate by descent from her husband, in order to relieve said real estate from the operation of the statute limiting her right to convey the same during a second contemplated marriage, without consideration conveyed the said real estate to the wife of the brother of her intended husband, relying upon the verbal agreement of the wife, her husband assenting, to reconvey the same after the marriage had taken place. She was in-

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*Catalani et al. v. Catalani.*

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duced to make the conveyance through the intimate and confidential relations existing between the parties, and at the earnest solicitation of the grantee and her husband. After the marriage the wife refused to reconvey.

*Held*, that parol evidence was admissible to prove the facts establishing a trust, although the deed was absolute in form, the statute of frauds having no application in such a case, since to apply it would make it an instrument of fraud.

From the Marion Superior Court.

*W. B. Walls* and *G. L. Walls*, for appellants.

*W. W. Herod* and *W. P. Herod*, for appellee.

OLDS, J.—This action was brought by the appellee against Mary Catalani and Nicoli Catalani, appellants. The complaint is in two paragraphs. The first paragraph seeks to recover \$2,000, the purchase-money for certain real estate conveyed by the appellee to the appellant Mary Catalani. The second paragraph seeks a reconveyance of certain real estate, situate in Marion county, and conveyed by appellee to the appellant Mary Catalani. The appellants demurred to each paragraph of the complaint, which demurrer was overruled, and exceptions reserved. Issues were joined and a trial had, resulting in a finding and judgment in favor of the appellee for the recovery of the real estate.

Appellants filed a motion for a new trial, which was overruled, and exceptions reserved.

Errors are assigned on the rulings of the court in overruling the demurrer to the complaint, and in overruling the motion for a new trial.

The principal question is presented by the ruling of the court in overruling the demurrer to the second paragraph of the complaint. The second paragraph of the complaint is in substance as follows: It is alleged that on the 2d day of July, 1886, the appellee was the widow of one Michael Pantone; that upon the death of her husband there descended to her, as such widow, certain real estate, which is described; that on said 2d day of July, 1886, she contemplated mar-

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*Catalani et al. v. Catalani.*

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riage with one Frank Catalani, and that in order to relieve said real estate from the operation of the statute prohibiting her from selling, conveying, mortgaging, or incumbering the same in any way during her second marriage, it was agreed between said appellant Mary Catalani, and appellee, that the appellee should convey said real estate to said Mary Catalani, to be held by said Mary for the use and benefit of the appellee until the appellee should consummate her said contemplated marriage by having the marriage ceremony with the said Frank Catalani performed in due form of law, and upon said marriage taking place the said Mary Catalani and her husband, said Nicoli Catalani, who also assented to said arrangement, agreed to reconvey said real estate back to and vest the title to the same in the appellee; that the present husband of the appellee, said Frank Catalani, is a brother of the said Nicoli Catalani, and said Frank had lived in the family of the said Mary and Nicoli as a member thereof, and that the relations of the said appellee and the appellants and said Frank Catalani were, at and before the time of said conveyance, of a very intimate and confidential character, and the appellee was induced by her present husband and the appellants to believe that she could safely vest the title to the said real estate in said Mary Catalani, and that she would, in good faith, hold said title for, and reconvey, the same back to her as soon as she and said Frank were married; that she in good faith relied upon the integrity and good faith of said Mary, and conveyed said real estate to her as aforesaid; that within a few days after said conveyance the appellee was duly and legally married to said Frank Catalani; and after her said marriage she requested said Mary to reconvey said real estate to her by quitclaim deed, as she had solemnly agreed to do; but said Mary, intending to cheat and defraud this appellee out of said real estate, and to hold the same for her own use and benefit, absolutely refused to convey the same to her; and, though often requested

so to do, still refuses to reconvey the same. Prayer for reconveyance, etc.

It is contended by counsel for appellants that the conveyance is a valid one, and that the paragraph of complaint seeks to show by parol that a deed, absolute upon its face, was made upon the agreement of the grantee to hold the land in trust, and reconvey it to the grantor at a future time upon the happening of a contingency, and that this can not be done ; that such an agreement is within the statute of frauds and can not be proven by parol.

By the demurrer the appellants admit the facts alleged in this paragraph, which show that the appellant Mary received the conveyance and title to the land without any consideration whatever ; that by virtue of the intimate and confidential relations existing between the parties the appellants were enabled to induce, and did by their promises induce, the appellee to rely upon their good faith and honesty and convey the land to said Mary upon an agreement that she would reconvey the same, upon her marriage ; and that she now, with the intent to cheat and defraud the appellee out of the land, and retain the same for her own use, refuses to reconvey the same as she agreed. If, under these circumstances, the appellee was prevented by the statute of frauds from recovering the land, the statute would operate to enable, and be the means of enabling, the appellant Mary to perpetrate a fraud upon the appellee, and it has been repeatedly held that this is not the purpose of the statute of frauds, and that the statute will not be permitted to aid in the perpetration of a fraud. Thus, in the case of *Tinkler v. Swaynie*, 71 Ind. 562, it was said by the court : " It has often been held that the statute of frauds shall not be made an instrument of fraud."

*Davies v. Otty*, 35 Beavan, 208, is a case where the plaintiff's wife deserted him, in 1844, and left with her paramour. In 1854 the plaintiff, not having heard of his wife since her departure, believed her to be dead, and married a second wife. In 1860 plaintiff was informed that his

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first wife was still living, and fearing prosecution for bigamy he made an arrangement with the defendant that the plaintiff should transfer his land to the defendant, which he did, the defendant to hold the same until after he was through with his difficulty, and then to reconvey the same. Plaintiff afterwards learned that the prosecution for bigamy was barred by limitation, and called upon the defendant to reconvey the land to him and the defendant refused, and claimed the land as his own. It was held that the statute of frauds did not apply, and that the plaintiff was entitled to recover. The court, in that case, after stating the facts, say: "This being so, I am of opinion that 'it is not honest to keep the land.' If so, this is a case in which, in my opinion, the statute of frauds does not apply."

In *Damschroeder v. Thias*, 51 Mo. 100, it is held that where one acquires title to land by fraud, and by fraud induces the owner to convey to him or acknowledge his title, a court of equity will declare him a trustee for the owner, and that he can not, in such case, invoke the statute of frauds and claim that agreements by which the title was obtained were verbal, and, therefore, void under the statute of frauds, and that the statute of frauds was never intended for the protection of fraud. While this decision probably goes too far, yet we cite it as showing that some courts go farther in the admission of parol evidence than it is necessary to do in this case in order to sustain the complaint.

In 1 Perry Trusts, section 226, it is said: "The statute of frauds is no obstacle in the way of proof of an actual or constructive fraud in the sale of property. Parol evidence is admissible to establish a trust, even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive." It is further said: "But where a conveyance in trust is made voluntarily, without solicitation or undue influence, a mere promise to hold in trust is within the statute."

But the facts alleged in this case show that the parties

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Harvey v. Baldwin.

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bore a peculiar and confidential relation to each other, and that the appellee was solicited, prevailed upon, influenced, and induced by the appellants to make the conveyance, and it would operate as a fraud to permit the form of the deed to be set up as a defence to the action.

This court has recognized this same doctrine in a number of cases. In *Cox v. Arnsmann*, 76 Ind. 210, numerous authorities are cited and quoted from, recognizing the doctrine that where it would operate as a fraud to allow the grantee to rely upon his deed, absolute upon its face, parol evidence will be admitted to prove the facts establishing a trust. Also, in the cases of *Teague v. Fowler*, 56 Ind. 569; *Jackson v. Myers*, 120 Ind. 504; *McDonald v. McDonald*, 24 Ind. 68.

We are of the opinion that the second paragraph stated a good cause of action, and that the demurrer thereto was properly overruled.

The question presented by the overruling of the motion for a new trial is as to the sufficiency of the evidence, and presents substantially the same question as the one presented by the demurrer to the complaint. The evidence supports the finding.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 17, 1890.

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No. 14,522.

### HARVEY v. BALDWIN.

**ATTORNEY'S FEES.—Unconditional Promise to Pay.—Validity of.**—An unconditional promise to pay attorney's fees is valid.

**SAME.—Value of Attorney's Services.—Proof.—Competency of.**—In an action on a promissory note containing an unconditional promise to pay attorney's fees where the complaint avers that a reasonable fee is fifty

124	56
133	590
124	59
156	318



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Harvey v. Baldwin.

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dollars, it is competent to prove the value of the attorney's services, although there is no direct averment in the complaint that an attorney was employed.

**SAME.—Evidence.**—It was not error to refuse to permit the defendant to prove that the plaintiff was an attorney, and competent to prosecute the action himself. A man is not bound to be his own attorney.

**SAME.—Agreement by Attorney to Receive One-Fourth of.—Mitigation of Damages.**—Where the defendant offered to prove in mitigation of damages that the attorney employed by the plaintiff had agreed to receive one-fourth of the attorney's fees, it was error to reject such offered evidence. The holder of a note can recover only what he agrees to pay his attorneys.

From the Cass Circuit Court.

*D. B. McConnell and S. T. McConnell*, for appellant.

*C. E. Hale*, for appellee.

**ELLIOTT, J.**—This action is founded on a promissory note containing an unconditional promise to pay attorney's fees, and the controversy here waged relates solely to the question of the right to recover such fees.

It has long been settled that an unconditional promise to pay attorney's fees is valid.

It was competent to prove the value of the services of the attorney, although there was no direct averment in the complaint that an attorney was employed, for the complaint avers that the reasonable fee is fifty dollars. As the note provides for the payment of attorney's fees it was enough to allege the breach of the contract, and state the damages generally; for where damages are expressly provided for in a contract they need not be laid as special damages. *Strough v. Gear*, 48 Ind. 100; *Roberts v. Comer*, 41 Ind. 475; *Johnson v. Crossland*, 34 Ind. 334; *Smiley v. Meir*, 47 Ind. 559.

There was no error in refusing to permit the appellant to prove that the appellee was an attorney, and competent to prosecute the action himself. A man is not bound to be his own attorney, and this ancient rule of the law is stingingly expressed in an old and familiar adage.

It is immaterial whether the appellee did or did not assist

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Harvey v. Baldwin.

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the attorney employed by him to prosecute the action. He had a right to assist him, and the fact that he may have done so can not diminish the compensation of the attorney actually employed.

As we have seen, the question of attorney's fees is a question of damages, and the defendant had a right, under the general denial, to introduce evidence in mitigation of the damages. If, therefore, evidence tending to reduce the damages was excluded there was error. We can see no possible escape from the conclusion that there was error, for the appellant offered to prove that the attorney employed by the appellee had agreed to receive one-fourth of the attorney's fees. It has been held, and correctly, that the holder of a note can only recover what he agrees to pay his attorneys. *Goss v. Bowen*, 104 Ind. 207.

In *Kennedy v. Richardson*, 70 Ind. 524, the court said: "If the holder has agreed with his attorneys for smaller fees than were stipulated for, such agreement will enure to the benefit of the maker of the contract, and will limit the amount of the holder's recovery on account of attorney's fees."

We can not sustain this judgment without overruling the cases referred to, and that we have no disposition to do.

If the appellee will enter a *remittitur*, within twenty days, for three-fourths of the amount allowed as attorney's fees, the judgment will be affirmed at his costs; otherwise it will be reversed.

Filed May 2, 1890.

#### SUPPLEMENTAL OPINION.

ELLIOTT, J.—Upon consideration of the matters alleged in the petition of the appellee, it is ordered and adjudged by the court that the mandate in this cause be so changed as to read as follows:

That within fifteen days from the date of this order the appellee shall remit, as of the date of the judgment in the court below, eight dollars and sixty cents; and in the event

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that a *remittitur* is so entered the judgment is affirmed at the costs of the appellant; but if the *remittitur* is not entered as directed the judgment is reversed at the costs of the appellee.

Filed May 15, 1890.

No. 14,167.

## THE H. G. OLDS WAGON WORKS v. COOMBS ET AL.

**CONTRACT.**—*Acceptance of Order.*—*Consideration.*—One Myers delivered to Coombs & Co. an order duly signed by him, and addressed to the Olds Wagon Works, and accepted by it, substantially as follows. "From this date you will please credit all shipments I may make to you to Coombs & Co., subject to settlement with them by note on ninety days' time, except doubletrees, etc., bought of me for cash, which I will collect."

**Held**, that an indebtedness due from Myers to C. & Co., and the agreement of the latter to make further advances to the former, were an adequate consideration for the execution of the order as between the immediate parties thereto; and the agreement of Myers to ship, and his subsequent shipment to, and the receipt of material by, the Olds Wagon Works, were an adequate consideration for the acceptance of the order by the latter, and for the agreement to credit and pay the amount of such shipments to Coombs & Co.

**SAME.**—*General Verdict.*—*Issues.*—M., in the suit by Coombs & Co. against the Olds Wagon Works (the acceptor of the order), having been made a party merely to answer to his indebtedness to Coombs & Co., and no issue having been joined between M. and the plaintiffs, a general verdict assessing the damages of the plaintiffs at a specified sum was good.

**SAME.**—*Interpretation.*—*Ambiguity.*—*How Removed.*—In interpreting a contract the language employed therein is the exclusive medium through which to ascertain its meaning; but in case the terms employed are ambiguous, or susceptible of more than one meaning, the situation of the parties and the circumstances under which the contract was made may be considered.

From the Allen Superior Court.

H. Colerick and W. S. Oppenheim, for appellant.

J. Morris and J. M. Barrett, for appellees.

124	62
132	122
124	62
136	677
124	62
140	539
124	62
147	611
124	62
155	550

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The H. G. Olds Wagon Works v. Coombs *et al.*

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MITCHELL, C. J.—On the 4th day of November, 1882, Myers delivered to Coombs & Co. an order duly signed by him and addressed to the Olds Wagon Works, substantially as follows: “From this date you will please credit all shipments I may make to you to Coombs & Co., subject to settlement with them by note on ninety days’ time, except doubletrees, etc., bought of me for cash, which I will collect.”

It appears from the complaint that Myers was engaged in getting out timber and manufacturing it into gearing, fel-loes, doubletrees, etc., and that he had become largely indebted to Coombs & Co. for money advanced to him. He was shipping, or proposing to ship, the material produced at his mill, or manufactory, to the Olds Wagon Works, and in consideration of an agreement on the part of Coombs & Co. to make further advances to him, with which to prosecute his business, he executed to them the order above set out, which it is alleged the Olds Wagon Works duly accepted. It is averred that the wagon works thereafter received shipments of material from Myers exceeding in value the amount of the indebtedness due from the latter to Coombs & Co., including the advancements made to Myers, and that the amount has all been paid over in pursuance of the order except \$266.66, which the defendant refuses to pay.

Accepting the averments of the complaint as true, the argument that there was no consideration to support the agreement to accept the order is not maintainable.

The indebtedness due from Myers to Coombs & Co., and the agreement of the latter to make further advances to the former, were an adequate consideration for the execution of the order as between the immediate parties thereto; and the agreement of Myers to ship, and his subsequent shipment to, and the receipt of material by, the Olds Wagon Works, were an adequate consideration for the acceptance of the order by the latter, and for the agreement to credit and pay the amount of such shipments to Coombs & Co.

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The H. G. Olds Wagon Works v. Coombs *et al.*

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In the view we take, the construction which the appellant seeks to place upon the complaint, and the bill of particulars thereto attached, is not an admissible one. After the order was delivered to Coombs & Co., and accepted by the Olds Wagon Works, it became effectual to transfer to the former an unqualified right to be credited with, and ultimately to be paid for, all material except doubletrees, etc., which Myers should thereafter ship to the latter, until the agreement was, upon reasonable notice, rescinded. It was a matter of no concern to the acceptor of the order whether the proceeds of shipments received by it were applied to an antecedent debt due to Coombs & Co., or to the liquidation of future advances. By the terms of the order which it had accepted, its obligation was to credit Coombs & Co. with all future shipments, with the exceptions therein noted, which might be received from Myers. The demurrer to the complaint was properly overruled.

There was no error in overruling the motion for a *venire de novo*.

We have not been able to discover from the record that there was any issue joined between the plaintiffs and Myers who was made a party to answer as to his indebtedness to Coombs & Co. There was a general verdict in favor of the latter, assessing their damages at a specified sum. The verdict was, therefore, perfect, and responsive to the whole issue, and must be regarded as covering everything within the issues necessary to reach the conclusion that the plaintiff was entitled to recover of the defendant the sum mentioned therein. Besides, whatever defects there may be in the verdict, if there are any, relate solely to the plaintiffs and Myers, and since they made no objection to it, the appellant, in respect to whom the verdict is perfect, can not complain. *Compton v. Jones*, 65 Ind. 117; *Whitworth v. Ballard*, 56 Ind. 279; *Griffin v. Reis*, 68 Ind. 9.

It is objected that the court erred in reference to the proper interpretation of the order which constitutes the foundation

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The H. G. Olds Wagon Works v. Coombs *et al.*

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of the action, and in its instructions to the jury upon that subject. It was the duty, as well as the exclusive province of the court, to interpret the instrument in question, and to instruct the jury as to its legal effect. *Robbins v. Spencer*, 121 Ind. 594, and cases cited.

In interpreting a contract the language employed therein is the exclusive medium through which to ascertain its meaning; but in case the terms employed are ambiguous, or susceptible of more than one meaning, the situation of the parties and the circumstances under which the contract was made may become a proper subject of inquiry in order to arrive at the sense in which the language was employed. *Crawens v. Eagle Cotton Mills Co.*, 120 Ind. 6, and cases cited. This in nowise militates against the rule that the meaning of the parties is to be ascertained from the language used in the writing, and that the interpretation of the instrument is a duty resting upon the court. The court may, however, in a proper case, direct the jury that the instrument may mean one thing or the other, depending upon extraneous circumstances to be found by them from the evidence. If this rule was infringed upon in the present case it was not to the detriment of the appellant.

There is evidence tending to sustain the general verdict; but accepting the view most favorable to the plaintiffs below, it seems to us the recovery was too large by the amount of \$45.63. Upon condition that the appellees will file a *remittitur*, in this court, of that amount, as of the date of the entry of the judgment below, within twenty days, the judgment is affirmed, at the costs of the appellees; otherwise the judgment will be reversed, with costs.

Filed May 13, 1890.

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END OF NOVEMBER TERM, 1889.

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT OF JUDICATURE  
OF THE  
STATE OF INDIANA,

124 66  
145 329

AT INDIANAPOLIS, MAY TERM, 1890, IN THE SEVENTY-  
FOURTH YEAR OF THE STATE.

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No. 14,166.

SCOTT v. SCOTT.

**JURY.**—*Decision on Appeal.*—*Reading of by Counsel.*—*Province of Court.*—  
Upon the retrial of a civil cause, reversed and remanded, it is not error  
for the lower court to refuse to allow the decision rendered on appeal  
to be read to the jury, since it is the province of the trial court to de-  
termine what the law is applicable to the facts proven in the light of  
the ruling of the Supreme Court.

**SAME.**—*Instructions.*—*Discussion of.*—*Section 534, R. S. 1881.*—It was not  
error for the court to refuse to allow the discussion before the jury of  
instructions prepared by the court and read to counsel in advance of  
the argument, upon request, as provided in section 534, R. S. 1881.  
Under the statute, *supra*, counsel may do no more than read such in-  
structions to the jury, and in the light thereof comment upon the  
facts.

**DEPOSITIONS.**—*Retaking of After Reversal of Cause.*—*Suppression.*—Where,  
after the reversal of a judgment because of error in suppressing parts  
of the depositions of certain witnesses taken by the appellant, the ap-  
pellant, without an order of court, takes again the depositions of the

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Scott v. Scott.

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same witnesses, it is not error to suppress the second set of depositions, the appellant having refused to accept the permission of the court to read either the first or second set, but not both.

From the Hancock Circuit Court.

*J. A. New* and *E. W. Felt*, for appellant.

*C. G. Offutt*, for appellee.

BERKSHIRE, C. J.—This was an action upon a note, and is in this court for the second time. See *Scott v. Scott*, 105 Ind. 584.

Judgment was rendered for the appellee, who was the defendant in the court below. The evidence is not in the record.

There are several specifications in the assignment of error, but the only one to which our attention is called by the briefs of counsel is the third—that the court erred in overruling the motion for a new trial.

Many of the reasons assigned in the motion are not before us for consideration, but notwithstanding we have concluded to take up and decide those to which counsel allude in their briefs.

It is contended that the court erred in refusing to allow counsel for the appellant to read from the reported decision made by this court when this case was first here.

In civil cases the jury are the exclusive judges as to the facts proven, but they must receive the instructions given by the court as the law of the case. To support so plain a proposition a citation of authorities is not required.

Counsel for the appellant could have had no other purpose in mind in offering to read from the reported decision to the jury than to get before them their views of the law of the case as they claimed it to have been declared by this court, and to have the jury take their views thus expressed in opposition to the instructions of the court.

If such was not the purpose of counsel we are unable to imagine how their client's cause was prejudiced by the court's ruling.



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It is true, as suggested by counsel, that the former decision by this court was forever after the law of the case, but it was the province of the trial court, and not of counsel, to determine the law as applicable to the facts proven in the light of what this court had ruled the law to be.

If appellant's contention had been adopted there would have been an earnest contention before the jury as to what this court had held as to the law upon the case made upon the former appeal.

The court was eminently fair to counsel when it permitted them to state their views as to the law of the case independent of authority.

The next question to which our attention is called is that the court erred in refusing to allow counsel for the appellant to read and construe in argument to the jury the instructions which it had prepared and read to counsel in advance of the argument upon request, as provided in section 534, R. S. 1881.

In this ruling there was no error. The court informed counsel that they could read its instructions to the jury, and in the light thereof comment upon the facts. This was the utmost that counsel were entitled to; anything more would have been but a discussion as to the law of the case before the jury. And had the jury been permitted to listen to arguments of counsel as to the construction to be placed upon the instructions, and to have accepted the construction contended for on either side, it would in a large degree have been the views of counsel rather than those of the court which would have controlled as the law of the case.

Such practice would be vicious in its tendencies; as often as otherwise the law as stated and declared by the instructions of the court would be set aside for the views of counsel. It was not the intention of the Legislature to allow such discussions to juries; the purpose was to enable counsel to know in advance of their arguments the views of the court as to the law of the case so that they might not be at

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the disadvantage of assuming a position before the jury in opposition to that of the court; and so far as the instructions might be favorable to either side that counsel on that side might have the benefit thereof.

Before the first trial the appellant had caused his own deposition and that of Robert McClarnan to be taken. The court below suppressed certain parts of both of these depositions. On appeal to this court the ruling of the court below was held to be error.

After the reversal, and after the cause had been remanded, the appellant, without first obtaining an order of the court, caused the depositions of said witnesses to be again taken. On the second trial appellee moved the court to suppress the depositions last taken. The court gave to the appellant the right to select which set of depositions he would cause to be read to the jury, but notified him that he would not be permitted to read both sets. The appellant claimed the right to read both sets of said depositions and refused to make a choice. The court then suppressed the last taken depositions and the appellant read the others.

It is contended that this was error. We do not think so. It is true, as contended, that at the time the last depositions were taken the lower court had not made its formal order overruling the motion to suppress the said parts of the first set of depositions, but the decision of this court was a revision and reversal of the ruling of the court below, and reinstated the said suppressed parts of said depositions. But were it otherwise, there were parts of said depositions which had not been suppressed, rendering it necessary that an order of the court should be obtained before again taking the depositions of said witnesses.

Conceding, however, for the purposes of the argument, that the action of the court was erroneous, there was no error in the ruling of which the appellant ought to be permitted to take advantage.

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It is argued by his counsel that there were certain facts testified to, and which are found in the second set of depositions, that were not found in the first set, but it is not claimed that the second set does not cover all that the first contains; and having read both sets of depositions we find that all that is in the first set is fully covered by the second, so that if the appellant was injured it was because of his refusal to accept of the offer of the court and to read the second instead of the first set of said depositions. He was not prejudiced by the court's ruling, but by his own action.

It looks just a little as though the appellant was more particularly anxious to get error into the record than to get all of the evidence before the jury. We can imagine no good reason why the appellant should have insisted on encumbering the record with the two sets of depositions except it was with the hope of securing available error in the record.

The case of *Ramsey v. Flannagan*, 33 Ind. 305, cited by counsel for appellant, was a case where at the time the deposition last taken was taken and read, the first deposition of the witness was out of the record as a suppressed deposition, and hence that case is not in point.

The next and last reason stated in the motion for a new trial to which our attention has been called is the refusal of the court to submit to the jury certain interrogatories asked by the appellant.

We do not think the court erred in its ruling. Most of the interrogatories rejected by the court were not pertinent or proper, and so far as any were proper they were covered by others.

The first inquired after the intention of the appellee in executing the release upon which the appellee rested his defence to the action.

The fifth was an inquiry as to whether or not the appellee intended when he obtained the release to pay the note.

The sixth inquired what the belief of the appellant was

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when he executed the release, as to whether or not the note was to be paid.

The intention and belief of the parties with reference to the transaction could only be ascertained from the facts found that preceded the execution of the release.

If the jury had answered as to the intention or belief of the parties the answers would have stated no fact upon which the court could have taken action, hence the interrogatories were improper; they could have had no other effect than to mislead the jury.

The third interrogatory sought to elicit the fact as to whether or not the debts and claims against the appellee had all been bought up before the execution of the release by the appellant and McClarnan, and if not, what claims still remained outstanding.

We can not discover from the record how an answer to that question would have been material.

The ninth interrogatory was as to whether or not the appellee, after his proceedings in bankruptcy were dismissed, agreed to pay the note in controversy.

The question asks for a mere conclusion. If the interrogatory had been submitted to the jury and answered in the affirmative it could have availed nothing to the appellant. If the interrogatory had gone further and stated, "If such an agreement was made, give its terms and conditions," some tangible fact might have been stated in the answer.

The tenth interrogatory inquires after the purpose of the release, whether to release the appellee personally, or in bankruptcy, or both. Conceding this to be a proper question for the purposes now under consideration, it is fully covered by the interrogatories numbered four and ten and one-half, and the answers thereto.

But we may further add that if all of the said interrogatories had been pertinent and proper we would not reverse the judgment because of their rejection, except it appeared

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from the record that answers thereto favorable to the appellant would have controlled the general verdict, and it does not so appear.

The judgment is affirmed, with costs.

Filed May 27, 1890.

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No. 14,217.

THE CRAIG SCHOOL TOWNSHIP v. SCOTT.

**TOWNSHIP.**—*Purchase by Trustees of School Land for Joint Graded School.*—

*Statute.*—The statute, section 4446, R. S. 1881, empowers the trustees of two or more school townships to organize a joint graded school, and to purchase suitable real estate to be used for that purpose. The trustees are the sole judges of the right to purchase property of this character, and in the absence of fraud between the trustees and the seller their decision is conclusive.

**SAME.**—*Propriety of Purchase.*—*Action upon Note for Purchase-Money.*—The advisability or necessity of the school, or the question as to whether the property purchased was suitable or proper, can not be inquired into in an action upon a note given for the purchase-money.

**SAME.**—*Parties.*—In an action upon the note for the purchase-money, which was made payable to the trustees of the Moorefield Lodge of Masons, the vendors of the real estate, and by them endorsed and assigned to the plaintiff, neither the trustees nor the grand lodge is a necessary party defendant.

**SAME.**—*Fraternal Order.*—*Knowledge of Members not Knowledge of Order.*—The knowledge of a member of a fraternal order of any fact is not the knowledge of the order; and the charge of fraudulent knowledge of the order is not established by the fraudulent knowledge or actions of a member of it.

**SAME.**—*Fraudulent Purpose of Trustee.*—*Sale by Vendor in Good Faith.*—*Recovery on Note for Purchase-Money.*—Although the trustee had a fraudulent purpose in purchasing the property, if the sale was made by the vendor in good faith, and taken possession of by the township and retained, a recovery on the note for the purchase-money can not be defeated.

From the Switzerland Circuit Court.

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The Craig School Township v. Scott.

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*F. M. Griffith and W. R. Johnston*, for appellant.

*W. D. Ward, J. A. Vanosdol and G. S. Pleasants*, for appellee.

OLDS, J.—This was an action brought by the appellee against the appellant on a note executed by the trustee of said Craig School Township, for and on behalf of said township, to the trustees of Moorefield Lodge, No. 213, F. and A. M., and by said trustees of said lodge assigned by indorsement in writing to the appellee, and alleged to have been given for the purchase-money of certain real estate and a building purchased by the trustee of said township from said lodge for the purpose of being used for a joint graded school for Craig and Pleasant townships of said county.

The complaint was in three paragraphs. A demurrer was filed to the first and third paragraphs, and sustained to the first and overruled as to the third, and exceptions reserved. An answer was filed by the appellant, consisting of several paragraphs, and a demurrer sustained as to the third and fourth paragraphs, and exceptions taken.

There was a trial had, resulting in a verdict and judgment for the appellee. Appellant filed a motion for a new trial, which was overruled, and exceptions taken. The errors assigned are :

1st. Overruling the demurrer to the third paragraph of complaint.

2d. Sustaining the demurrer to the third and fourth paragraphs of the appellant's answer.

3d. Overruling the appellant's motion for a new trial.

4th. That the second paragraph of complaint does not state facts sufficient to constitute a cause of action.

The causes of demurrer to the third paragraph of the complaint are want of sufficient facts to constitute a cause of action, and defect of parties defendant, in that the trustees to whom the note was made payable should have been made parties; also, for the same cause, for the reason that the

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Grand Lodge of F. & A. M. of Indiana should have been made a party.

It is contended that the assignors of the note should have been made parties defendant.

The note was made payable to the trustees of the Moorefield Lodge, No. 213, F. & A. M., and it is alleged in the complaint that the note was, by the trustees of said lodge, transferred by endorsement in writing. It is further alleged that the said trustees, naming them, who made said assignment, were trustees at the time, but that since such assignment said lodge had been disbanded and its charter surrendered.

There was no necessity of making either the trustees of the Moorefield Lodge or the Grand Lodge parties defendants. The note was properly endorsed, and the title to it was transferred to and vested in the appellee.

It is further contended that the third paragraph of complaint is defective for the reason that it does not show any necessity for the purchase of the property, or allege facts creating a necessity for such purchase, or for a graded school.

Section 4446, R. S. 1881, authorizes the school trustees of two or more distinct municipal corporations for school purposes to establish joint graded schools, and further authorizes such trustees to purchase suitable grounds for such graded schools, and to erect suitable buildings thereon, and it provides that the title to such property shall vest jointly in the corporations establishing such graded schools. This section of the statute contemplates and authorizes the trustees of two or more school townships to join together and to purchase real estate suitable for graded school purposes, and to establish graded schools. It makes the trustees the judges of the propriety and advisability of establishing such graded schools and of purchasing real estate for that purpose, and this paragraph of the complaint alleges facts and shows that the real estate for which the note sued upon was given for part of the purchase-money was purchased by the

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trustees of said Craig township and Pleasant township for use as a graded school building; that it was suitable and proper for such purpose, and that it was a necessity to purchase real estate for that purpose; that the trustees of said two townships joined in making such purchase, and that they took deeds from said masonic lodge to each of said townships for the undivided one-half of the same, and that both deeds were executed at the same time. The averments of facts in the complaint show a legitimate exercise of power by the trustees of said two townships in making such purchase. The demurrer was properly overruled to the third paragraph of the complaint. The second paragraph of the complaint is similar to the third and presents no different question, and the assignment of error as to it is not well taken.

The third paragraph of answer alleges that there was no occasion for the purchase of said property by said township; that there was no necessity for a joint graded school by said Craig and Pleasant townships; that there was never any graded school organized or conducted by said townships; that said lodge, at the same time of executing the deed to the appellee for the undivided one-half of the upper story of the building upon said real estate, also executed a deed to Pleasant township for all of said property, describing the lot upon which the same was situated; that the title to the property so conveyed to the appellee is defective, if not void, and that the township received no benefit from such conveyance.

It is not alleged that the lodge of which the appellant purchased had any knowledge that a graded school was not organized, or that such school would not be conducted in said building, and no facts are alleged tending to show but that the lodge sold and conveyed the property to the township in good faith, believing the same was being purchased to be used for graded school purposes. The complaint alleged the purchase of said premises for the purpose of establishing a graded school jointly with Pleasant township, and using said building for said purposes; and further alleges that the ap-



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pellant accepted said deed for the same and entered into possession of the same. The fact that the appellant entered into possession of said property is not controverted in the answer, nor does it allege any offer or willingness to rescind the contract of purchase.

There was an answer in denial pleaded to the complaint.

The statute empowers the trustees of two or more school townships to organize a joint graded school, and to purchase suitable real estate to be used for the purpose of such school, and having such power they determine the advisability and necessity for such school, and by making a purchase for that purpose, the contract becomes valid and binding. The advisability or necessity of the school at the time of the purchase can not be inquired into in an action brought upon a note given for the purchase-money.

The trustees having determined to establish a joint graded school, they had the power to purchase real estate to be used for that purpose, and such purchase would be valid and binding although the purpose of establishing and conducting a school of that character might afterwards be abandoned.

When the trustees joined together and purchased real estate of one who owned the same for that purpose, and the owner in good faith conveyed the same to the townships, and the townships took possession of the same, the owner of the land conveying the same had the right to enforce the contract and collect his purchase-money, and especially is this true while the township still holds possession of the land and the benefit of the contract.

The fourth paragraph alleges collusion between the one trustee, the trustee of appellant, and some members of the lodge to procure a sale of the real estate to enable the lodge to realize money from the property and pay a debt of the lodge for which they were individually liable, and that they caused a petition to be circulated and signed by a large number of the citizens, requesting the then trustee to purchase said building for joint graded school purposes. And it avers

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that the township was not in need of a graded school, and if they did the property purchased was not suitable.

This paragraph shows that a petition was circulated and largely signed by the citizens of said appellant township, requesting the then trustee to join with the trustee of said Pleasant township and purchase said property. It in no way controverts the fact that the trustee of Pleasant township acted in good faith, or that the property was conveyed as alleged in the complaint to the two townships, and that the same was taken possession of by the appellant, nor does it appear but that a joint graded school was organized, and the same is being conducted in said building. The townships still retain the title and possession of the property, and have never offered to reconvey or rescind the contract.

The demurrer was properly sustained to both the third and fourth paragraphs.

Nothing appears in the record in this case to show that the purchase was made in violation of sections 6006 and 6007, R. S. 1881, and we can not therefore presume that such debt was contracted in violation of such sections. The question presented involves the right of township trustees to join and purchase property to be used for joint graded school purposes under section 4446, and what we have said proceeds upon the assumption that sections 6006 and 6007 were not violated.

By the overruling of the appellant's motion for a new trial, some questions are presented as to the correctness of the instructions given and refused by the court. We do not deem it necessary to set out the instructions. Objection is made to the second instruction given, which gives a synopsis of the defence set up in the sixth paragraph of answer. This paragraph is pleaded upon the theory that the sale of the property was made, and the note sued on executed, through a fraudulent conspiracy entered into between Jester, the then trustee of the township, and the lodge of which the property was purchased, which had not been ratified by

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the townships, and that the townships had in no way received or accepted the benefits of the purchase. The instruction is not objectionable. It properly stated the theory of the paragraph of answer.

Objection is made to the eighth instruction by which the court told the jury that "Knowledge of a member of a fraternal order of any fact is not the knowledge of the order, and the charge of fraudulent knowledge of the order is not established by the fraudulent knowledge or actions of a member of it." This instruction is correct.

By the thirteenth instruction the jury are told that if the trustee was intending to perpetrate a fraud in the purchase of the property, and the lodge was cognizant of it and participated in the fraud, and the appellant never received title to or came into possession of the property, the plaintiff could not recover.

Although the trustee had a fraudulent purpose in purchasing the property, if the seller had no knowledge of such fraudulent purpose, and in good faith sold and conveyed the property to the townships Craig and Pleasant for the purpose of being used and occupied in conducting a joint graded school, and the townships took possession of the same, and the appellant kept the possession and retained the title and benefit of the purchase, they can not defeat a recovery on the note for the purchase-money.

The other questions presented by the giving and refusal of instructions do not involve different questions from those already discussed.

It is contended that the trustees are not the sole judges of the right to purchase property of this character, and that the necessity and advisability of organizing and establishing such a school may be raised in an action for the purchase-money, also, the question as to whether the property purchased is suitable and proper, but we can not agree with this theory. We think the trustees are empowered to purchase property of this character, and in the absence of fraud

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between the trustees and seller their decision is conclusive, and especially the township can not retain title to the property and the benefit of the purchase and defeat a recovery, as contended for in this case. *Johnson School Tp. v. Citizens Bank*, 81 Ind. 515; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213; *Sheffield School Tp. v. Andress*, 56 Ind. 157.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed May 27, 1890.

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No. 14,289.

THE NOBLESVILLE GAS AND IMPROVEMENT CO. v. LOEHR.

**NEGLIGENCE.—Contributory.**—*What Constitutes.*—*Falling into Unguarded Ditch.*—It can not be said, as a matter of law, that one who runs to a fire, on a dark night, on the streets of a city, to assist in extinguishing it, falling into an open ditch and receiving an injury, is guilty of contributory negligence. In the absence of some notice to the contrary he had the right to presume that the streets were in a reasonably safe condition.

**CORPORATION.—Gas Company.—Unauthorized Act of Individual Director.—Street Excavation.—Liability to Person Injured by Falling into.**—A gas company is not liable to a person injured by falling into a ditch left unguarded, which was constructed under the direction of one of the directors, without authority from the board to act for the company.

**SPECIAL VERDICT.—Failure to Find Essential Facts.—Intendment.**—A special verdict must contain a finding of the facts, and if any fact essential to support the judgment is not found, the judgment must fall. Nothing can be supplied by intendment.

From the Boone Circuit Court.

*T. J. Kane* and *T. P. Davis*, for appellant.

*R. R. Stephenson* and *W. R. Fertig*, for appellee.

**COFFEY, J.**—This was an action instituted by the appel-

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196	233
134	79
140	219
134	79
144	607
146	153
146	575

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lee against the appellant for the purpose of recovering damages alleged to have been sustained by the appellee by reason of falling into a ditch constructed by the appellant in the streets of the city of Noblesville.

The complaint consists of two paragraphs.

The first alleges, substantially, that the appellant is a corporation, duly organized under the laws of the State of Indiana, and is engaged in the business of supplying natural gas to the citizens of Noblesville through mains sunk into the earth along the streets of said city; that in constructing its gas mains to the Evans Flouring Mill, on Polk street, in said city, said appellant dug a trench along said street two feet wide and four feet deep, and wrongfully, carelessly and negligently left the said trench open and exposed for a period of three weeks, with no guards, lights or other signals, to indicate to persons using said street the existence or location of said trench, or the danger of passing along or over that part of the said street; that, on the 1st day of May, 1887, one dark night while said trench was in the condition aforesaid, an alarm of fire was given from said mill, and the appellant, with many other citizens, was running to said mill for the purpose of assisting in the extinguishment of said fire, and the appellant fell into said trench, without any fault or negligence on his part, whereby he was injured.

The second paragraph of the complaint does not differ materially from the first, except in a description of the injuries received by the appellee and the extent of the same.

The court overruled a demurrer to each paragraph of the complaint, to which appellant excepted.

On issues formed the cause was tried by a jury, who, under instructions of the court, returned a special verdict, upon which the court rendered judgment for the appellee.

It is contended by the appellant that it affirmatively appears by the complaint that the appellee was guilty of contributory negligence in running on the street on a dark night,

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and that, therefore, the complaint is bad, and as a consequence the court erred in overruling its demurrer.

We can not say as a matter of law that the appellee, in running to a fire on the streets of the city of Noblesville, on a dark night, was guilty of negligence. In the absence of some notice to the contrary, he had the right to presume that said streets were in a reasonably safe condition. *Jennings v. Van Schaick*, 108 N. Y. 530; *Shook v. City of Cohoes*, 108 N. Y. 648; *Stevens v. City of Logansport*, 76 Ind. 498.

In our opinion the court did not err in overruling the demurrer to the complaint.

It is contended by the appellant that the special verdict of the jury is not sufficient to authorize a judgment in favor of the appellee as against the appellant.

The first contention is that it is not found by the verdict that the appellant constructed, or authorized the construction of, the trench into which the appellant fell.

So much of the special verdict as relates to this branch of the case is as follows :

"That in March or April, 1887, said defendant commenced negotiations with J. C. Evans to supply his mill and elevator, on Polk street in said city, with natural gas, by piping it under ground to his said mills, and pending such negotiations, and before a final contract had been made with him, a difference of opinion arose in the defendant's board of directors as to running the pipes to said mill and elevator before said contract had been signed by said Evans, some of the directors wishing said pipes to be put in the trenches and run to said mill before the contract was made, but a majority of the board was opposed to this; and while this difference of opinion existed, and before the contract with Evans was completed, one of the directors of the company caused some of the men, about the latter half of April, 1887, to dig such trench along Polk, one of the public streets in said city leading from the company's principal gas mains

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in said city, north along said Polk street to said mills and elevator, for the purpose of supplying said mills, when said contract should be made, with gas through pipes to be laid in said trench. Said trench was so constructed by said men within eight or ten feet of, and along the front of said elevator on said Polk street. \* \* \* On discovering that said trench was being dug the defendant, through its proper officers and agents, stopped the men and filled up a portion of said trench, but did not fill up that part in front of the elevator until after the plaintiff fell in, as hereinafter found, when one of its workmen filled it up. The men who dug the trench were paid by Doc. Booth for their labor in so doing, as treasurer of the Gas and Improvement Company of Noblesville, Hamilton county, Indiana. \* \* \* In June, after said accident, the defendant made a contract with said Evans to supply said mills and elevator with gas, and reopened said trench, and straightened it, and put in its pipes, and has furnished said Evans with gas ever since."

The directors of a corporation act as a board, and not individually, unless specially authorized by the board to act, and then they act as special agents with special powers, and not as directors. A single director has no power, by virtue of his office, to act for or bind the corporation, except in so far as the power has been delegated to him by the board of directors. No director, not even the president of the board, as a general rule, has any implied power or authority derived from his office, to act as the agent of the corporation, but, like any other agent, he must derive his power from the board of directors. The act of less than a majority of the board of directors is void. Wood Railway Law, pp. 408, 422; Pierce Railroads, p. 34; Rorer Railroads, p. 224.

It follows, from these authorities, that the act of one of the appellant's directors, in constructing the trench in question, was not the act of the appellant simply by reason of the fact that he was a director; but to bind the appellant it must ap-

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pear that he was acting under some authority derived from the board of directors.

It remains, therefore, to inquire whether there is anything in the special verdict from which it appears that the director ordering the trench was acting under the authority of the appellant. A special verdict must contain a finding of the facts, and if any fact essential to support the judgment is not found the judgment must fall. Nothing can be supplied by intendment. A failure to find a fact in favor of a party, upon whom the burden as to such fact rests, is equivalent to finding such fact against him. *Housworth v. Bloomhuff*, 54 Ind. 487; *Buchanan v. Milligan*, 108 Ind. 433; *Town of Albion v. Hetrick*, 90 Ind. 545; *Dixon v. Duke*, 85 Ind. 434; *Vinton v. Baldwin*, 95 Ind. 433.

There is no finding that the trench into which the appellee fell was constructed by the appellant, or by its authority, nor that the parties who did construct it had any authority from the appellant to do so. Indeed, it appears that as soon as the appellant learned of its construction it filled up a part of the same. The fact that the men who did the work were paid out of the appellant's treasury was an evidential fact tending to prove that the trench was constructed by the authority of the appellant, but is not conclusive upon the question.

In our opinion the verdict before us is not sufficient to authorize a judgment for the appellee.

Other questions are presented and argued, but as they are not necessary to a decision of the cause, and may not arise upon another trial, we deem it unnecessary to decide them.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed May 27, 1890.



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Long, Executor, v. Straus et al.

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No. 13,896.

**LONG, EXECUTOR, v. STRAUS ET AL.**

**DEPOSITION.—Notice.—Sufficiency of.**—A deposition will not be suppressed on the ground that the notice was insufficient, if the notice given secured the attendance of all the parties at the proper place and time.

**SAME.—Pendency of Appeal.**—Depositions to preserve testimony may be taken at any time, and the fact that the case is pending on appeal does not deprive the parties of this right.

**SETTLEMENT.—Mutual Dealings between Parties.—Items of Account.—Presumption.**—Where there are mutual dealings between parties, settlements made and notes given by one of the parties, the presumption is that the settlements covered and included all the items of the account.

**PAYMENT.—Delay in Presenting Claim.—Presumption.**—A delay of almost twenty years in presenting a claim, taken in connection with other circumstances, was properly treated as creating a presumption that the money deposited with the defendants had been repaid.

From the De Kalb Circuit Court.

*W. L. Penfield, H. G. Zimmerman, D. W. Green and F. P. Bothwell*, for appellant.

*J. H. Baker and F. E. Baker*, for appellees.

**ELLIOTT, J.**—This case is here for the second time. *Long v. Straus*, 107 Ind. 94. The questions presented by the present appeal arise on the ruling denying a new trial.

It is insisted by appellant's counsel that the court erred in refusing to suppress the deposition of Edmund D. Meagher because sufficient notice was not given, but we think counsel are in error. The notice given accomplished its purpose, for it secured the attendance of all the parties at the proper place and time, and it is quite clear, therefore, that the appellant can not successfully assert that the time intervening between the service of the notice and the time fixed for taking the deposition was insufficient.

It is also argued that, as the cause was pending in this court at the time the deposition was taken, it should have been suppressed. There is no strength in this position. The appellees had a right to take depositions to preserve testi-

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Long, Executor, v. Straus *et al.*

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mony at at any time, and the fact that the case was pending on appeal did not deprive them of this right. They were not bound to take the risk of losing the testimony ; but had there been no opportunity for using it they would have been compelled to pay the costs of securing it.

It was competent for the book-keeper to state that all loans and deposits were entered on the books of the appellees. This is so, because the evidence tended to show various settlements of accounts wherein the books were balanced, and as there were settlements made and accounts balanced, the testimony of the book-keeper tended strongly to show that the claim sued on was included in the settlements.

The instructions presented the law fully and fairly to the jury. The rule is well established, that where there are mutual dealings between the parties, settlements made and notes given by one of the parties, the presumption is that the settlements covered and included all the items of the account. *Coon v. Brown*, 13 Ind. 150 ; *Wilkins v. Ferguson*, 47 Ind. 136 ; *Dodds v. Dodds*, 57 Ind. 293 ; *Gregg v. Union County, etc., Bank*, 87 Ind. 238 ; *Lake v. Tysen*, 6 N. Y. 461.

Long delay in presenting a claim may, in some instances, be a circumstance tending to prove payment, and in other instances it may be sufficient, when taken in connection with other circumstances, to create a presumption of payment. In this instance it was clearly proper to treat the long delay (a delay lacking only two or three days of twenty years), taken in connection with other circumstances, as creating a presumption that the money deposited with the appellees had been repaid.

The judgment below is so clearly right, on the merits, that we could not reverse, even if we had found some errors in the record ; but we have found none of any materiality whatever.

Judgment affirmed.

Filed May 27, 1890.

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 Byer v. The Town of New Castle et al.
 

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No. 14,100.

**BYER v. THE TOWN OF NEW CASTLE ET AL.**

124	86
134	136
134	86
144	564

**MUNICIPAL CORPORATION.**—*Town.*—*Opening of Street.*—*Commissioners' Report.*—*Acceptance of by Trustees.*—*Parol Evidence.*—Where the record of the board of trustees shows that a proper petition praying for the opening of a street was filed; that commissioners were duly appointed to assess benefits and damages, and that the commissioners made and filed their report with the town clerk, but fails to show that the board accepted the report within twenty days, or that any further action was taken by that body in opening the street, it is incompetent to prove by parol that the board of trustees accepted the report within the time prescribed, and that it determined to make the appropriation of the land therein described.

**SAME.**—*Act of Municipal Body.*—*Competent Evidence of.*—The only competent evidence of any act or proceeding of a municipal body upon which the members of the corporate board are required to vote, is the record of the proceedings.

From the Henry Circuit Court.

*C. S. Hernly* and *S. H. Brown*, for appellant.

*J. H. Mellett*, for appellees.

**MITCHELL, J.**—Byer instituted this proceeding for the purpose of enjoining the town of New Castle from opening a new street over certain real estate owned by him. It is conceded that the record of the board of trustees shows that a proper petition praying for the opening of the street was filed; that commissioners were duly appointed to assess benefits and damages, and that the commissioners made and filed their report with the town clerk as required by the statute. The record, however, failed to show that the board accepted the report within twenty days, or that any further action was taken by that body in respect to opening the street. The court permitted the town to prove, by parol, that the board of trustees accepted the report within the time prescribed, and that it determined to make the appropriation of the land therein described. The propriety of this ruling is called in question. It is undoubtedly true, where one has

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been induced to perform work, or expend money, on the faith of the proceedings of a board of trustees, or common council, that the municipality may be estopped, after receiving the benefit of the work, to say that the evidence of the proceedings was not properly preserved. In cases of that character it is always competent, in the absence of a record, to show by parol that the work was duly authorized by contract, or resolution, or that the money was expended in pursuance of proceedings actually taken, but not entered upon the records of the corporation. *City of Logansport v. Dykeman*, 116 Ind. 15, and cases cited. The right of third persons, who acted in good faith in reliance upon the proceedings of a corporate board, can not be prejudiced by the default, or neglect, of the officers of the corporation who fail to keep a proper record of its acts, or proceedings. *City of Troy v. A. & N. R. R. Co.*, 13 Kan. 70. In like manner, where a third person has actually received the benefit or consideration which resulted from the proceedings of a board of trustees, he may be estopped to deny the regularity of the proceedings, while retaining the consideration, on the ground that they were not properly entered of record.

Where, however, an attempt is made to appropriate the property of an individual, the record of the board of trustees must be made to show that the steps necessary to accomplish the appropriation were taken, unless the owner of the land has in some way estopped himself from denying the fact of appropriation. *City of Aurora v. Fox*, 78 Ind. 1.

It would be going too far to hold that a municipal corporation might prove by parol that the essential steps required to be taken, by the body representing the municipality, in proceedings to appropriate real estate had been taken, although the records of the corporation indicated nothing upon the subject. Whether the board might cause its record to be corrected, is quite a different question, with the decision of which we are not now concerned. *Chamberlain v. City of Evansville*, 77 Ind. 542.

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The statute in which provision is made for the opening of new streets requires the board of trustees either to accept or reject the report of the commissioners appointed to assess benefits and damages, within twenty days from the time it is filed with the city clerk. If the board determines, by a vote of a majority of the members, to appropriate the real estate described in the report, other duties are imposed upon it by the statute, and an appeal is allowed by any owner of land feeling himself aggrieved by the report. Sections 3370, 3371, 3372, R. S. 1881.

Section 3324, R. S. 1881, requires the town clerk to attend all meetings, and record the proceedings of the board of trustees. The only competent evidence of any act or proceeding of a municipal body upon which the members of the corporate board are required to vote, is the record of the proceedings. *City of Logansport v. Crockett*, 64 Ind. 319.

We can not adopt the view that many of the most important steps in a proceeding to appropriate real estate for a public street may be proved by parol, without any effort to correct the record of the board, or to account for the absence of its proceedings from the record. The appropriation is required to be made, or determined upon, by a vote of a majority of the members of the board; and the fact that a majority voted and made the appropriation can not be proved by parol without, in some way, accounting for the absence of the proper record evidence. *City of Delphi v. Evans*, 36 Ind. 90.

So far as appears, this is a naked attempt to prove an appropriation of real estate by parol. This can not be done without in some way bringing into requisition the doctrine of estoppel.

The judgment is reversed, with costs.

Filed May 26, 1890.

The Louisville, New Albany and Chicago Railway Co. v. Graham, Adm'r.

No. 14,225.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. GRAHAM, ADMINISTRATOR.

**MASTER AND SERVANT.—Railroad.—Action against for Wrongfully Causing Death of Employee.—Complaint.—Sufficiency.**—A complaint by an administrator in an action against a railroad company for negligently causing the death of his decedent while he was engaged in repairing a tunnel on the line of the road, alleged the insufficiency of the braces of the tunnel, and its dangerous condition, and that it had long remained in such condition, the defendant knowingly allowing it to become and remain so; that the defendant, well knowing the dangerous condition of the tunnel, and that its condition was not visible by ordinary observation, ordered the deceased, who was free from fault, without warning him of the character or condition of the supports, braces or walls, or of the danger, to work at the place where he was injured and killed, and exposed him to the perils and hazards of falling timbers, stones and dirt; that the deceased was wholly without fault, and wholly ignorant of the condition or character of the tunnel, rocks, dirt and supports.

**Held**, that the complaint was not subject to the objection that it appeared therefrom that the deceased assumed the risk of the necessarily hazardous work, nor to the objection that it did not show that the danger could not have been known to the deceased by the use of ordinary diligence and care.

**SAME.—Special Verdict.—Judgment for Plaintiff.**—The jury in their special verdict found facts sufficient to show that the railroad company did not provide a safe place for the deceased to work; that the foreman, entrusted with the superintendency of the work, and acting for the master, had full knowledge of the dangerous character of the tunnel and the liability of the rock to fall and kill the deceased; that he might, with reasonable diligence, have guarded against the danger; that the death of the deceased was caused by the foreman's negligence, and that the deceased was without fault, and had no knowledge of the dangerous condition of the tunnel, or the crack in the rock, or its liability to fall and injure him.

**Held**, that the plaintiff was entitled to judgment.

**SAME.—Respondent Superior.**—An employer must use ordinary care and reasonable skill to make safe the place where he requires his employees to work. This duty the employer can not delegate, and he can not escape responsibility by delegating the duty of looking after and providing a safe place to any other person. If the employer delegates such duty to another, such person acts for the employer, and if such duty is negligently performed the employer is responsible.

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131	636
124	89
139	415
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153	632
124	89
159	668
124	89
171	404

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**SAME.—Foreman in Charge of Work.—Fellow-Servants.**—A foreman entrusted with exclusive control of work, and of providing a safe place for employees to work, acts in the discharge of such duty for the master, and is not a fellow-servant of one injured through his negligence in failing to provide a safe place for him to work, and the railroad company is liable.

From the Lawrence Circuit Court.

*G. W. Friedley, J. Giles, E. C. Field and C. C. Matson*, for appellant.

*M. F. Dunn and G. G. Dunn*, for appellee.

**OLDS, J.**—This was an action brought by the appellee against the appellant for negligently causing the death of appellee's decedent. The death of Miller occurred while he was repairing a tunnel on appellant's line of railroad in Greene county, Indiana, caused by the falling of stone and dirt, and the giving way of the timbers.

There was a trial by a jury, and a special verdict returned, and judgment rendered on the special verdict in favor of the appellee.

Numerous errors are assigned, but the only ones discussed are the overruling of appellant's demurrer to the first and second paragraphs of complaint, upon which paragraphs the trial was had, and the ruling of the court in overruling the appellant's motion for judgment on the special verdict.

It is contended that each paragraph of the complaint is bad, for the reason that it clearly appears from each of them that the work in which the deceased was engaged was necessarily hazardous, and that the deceased assumed the risk resulting from falling stone and dirt, and that at least the complaint does not show that the danger could not have been known to the deceased by the use of ordinary diligence on his part.

The complaint is not subject to the objections urged to it. It alleges the insufficiency of the braces and the dangerous condition of the tunnel, and that it had long remained in such condition, and that the appellant knowingly allowed

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it to become and remain in such condition ; that the defendant well knew the dangerous condition of the tunnel, and that its condition was not visible by ordinary observation ; that the appellant, without any fault whatever on the part of the deceased, and without any warning to him of the character or condition of the supports, braces or walls, or of the danger at said point, ordered deceased to work at the place where he was injured and killed, and exposed him to the perils and hazards of falling timbers, stones and dirt ; that said deceased at the time was wholly free from fault on his part, and wholly ignorant of the condition of character of said tunnel, rocks, dirt and support at said point and at said time.

The allegations of the complaint, and each paragraph thereof, are clearly sufficient to avoid the objections urged against them.

The jury, in their special verdict, found the following facts :

“ That the defendant (the appellant) was a duly organized corporation operating the road, etc. ; that the said Alonzo Miller died by reason of the injuries received in the tunnel ; that he left surviving him as his sole heirs his wife, who had born to her a child, the issue of said marriage, the day following the burial of the deceased.

“ That the said tunnel, on the line of defendant's road, in July, 1886, was badly out of repair by reason of the supports, which were of wood 10 by 12 inches square, and caps of the same size, breaking down and falling in, together with the dirt and stones above and about them at the east end of said tunnel ; that the defendant corporation left the management and control of the repairs thus going on in said tunnel to one George Richards, a boss and foreman ; that said George Richards, foreman, on the day of the killing of Alonzo Miller, and prior to that time, and during the month of July, 1886, was in the employ of the defendant, and as defendant's foreman, superintending the repairs and work going on



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in said tunnel, ordering, directing and giving instructions to the men therein employed and at work, and at the time of the killing of said Miller the said Richards, foreman, was the sole and only agent of the defendant in said tunnel exercising authority or having power over said Miller and said men; that said Richards had employed said Miller, deceased, and said men, for the defendant; that when said men were paid Richards paid them for the defendant as defendant's agent and foreman, and that when men were discharged Richards was the man who discharged them; that said Richards was knowingly permitted by the defendant to exercise full authority at said time over said men; that he had power to employ, oversee and discharge men.

"That said Richards had been engaged on said road and in and about said tunnel for about nine years, and had charge, for several years prior to the killing of said Miller, of the bents, timbers, uprights and supports in said tunnel, and was thoroughly familiar therewith, and was fully advised of the dangerous character of said supports and of the sides and walls of said tunnel at, near and about the point where the said Miller was killed.

"That said Miller was employed as a common day laborer in the year 1886 by said Richards, defendant's foreman, to work in and out of said tunnel; that on the day of said Miller's death he was at work on the outside of said tunnel, at the west end thereof, shovelling dirt, together with other men employed by said Richards; that while so at work said Richards ordered him into the tunnel to work to help the bridge men; that at said time said Richards had the superintendency of two gangs of men as foreman, one a gang of bridge men or carpenters, and the other common laborers, to which last said Miller belonged, but was frequently called upon and required by said Richards to help the bridge carpenters.

"That upon the day of his death, by the order of Richards, Miller went into the tunnel about 135 feet from the east

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end thereof, and assisted the carpenters in raising a bent; that said bent was raised and put up under the supervision and direction of said Richards, foreman, for defendant, and said Richards was the only foreman, engineer, master mechanic or road master of the defendant in or about said tunnel; that at said point the old bents in said tunnel were of oak timber, 10 by 12 inches square, and the caps were of the same size, and the new bents were 12 by 12 inches square, and the caps 12 by 14 inches square; that said Richards at the time knew that the old bents were too light, and insufficient for the purpose, and for that reason the same was being repaired and new timbers being put in at that time at that place; that at that point it was so dark that many of the employees were using miners' lamps.

"That about six feet west of the new bent which Miller assisted to put in, there was the post, the upright piece supporting an old bent, and prior to said day there had been attached timbers, called bagging, with dirt behind them, which served to support and brace the walls and stone in the rear behind the post; that on the morning of the day of the death of Miller, by order of Richards, bagging was removed, leaving the walls and sides of the tunnel at that point unsupported and unbraced.

"That between the said post or upright piece of the old bent and the new bent, near where the bagging had been removed, and on the same side of the tunnel, by order of Richards, a hole, called a hitch, was being dug for the purpose of setting another bent next west of the other new one which Miller helped to raise, and was about three or four feet west of the old one referred to; the digging of said hitch had been commenced by other workmen, members of the carpenters' gang, and then said Miller was ordered to complete the digging of the same, and while at work digging the same, he was struck by a piece or pieces of falling timbers and pinned down on and against a car and standard of a car belonging to the defendant, then at said point on

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the track in the tunnel, and was thereby crushed, bruised and wounded, from which bruises and wounds he, within a few hours afterwards, died.

“That at the time of said accident, said Miller was at work down in the ditch with a spade and shovel, furnished him by said Richards, and said Miller was doing the work assigned to him in a proper and skilful manner, and did nothing to bring about the accident, or cause the timber or rocks to fall.

“That the timber that struck said Miller was caused to fall by reason of a rock in the wall of said tunnel which extended from a new bent erected that day, under the orders and supervision of Richards, near an old bent which had been standing seven or eight years; that the new bent was insufficiently braced, and the timber in the old was insufficient in size and strength, as Richards well knew; that the upright piece was brash and insufficiently braced; that Miller was at work between the old and new bent, the supports thereof, with the knowledge of and under the directions of Richards, and while so at work, by reason of a crack in the wall on the north side of said tunnel, about eight feet west and six feet above a point where said Miller was at work in said tunnel, the said Miller was injured and killed, said crack in the rock causing said rock to fall down over and against the timbers in said tunnel and the supports thereof, and throwing the same over and against said Miller and killing him.

“That said tunnel was about eleven feet broad and fifteen feet high; there were a locomotive and cars in the tunnel, and it was dark, and said crack in said rock could not be seen by a person, or by Miller, from the point where he was at work; that said Richards' attention had been called to said crack in the rock, and he knew of it the day before the injury to said Miller, and said Richards examined said crack the day before the accident; that said Richards probed the crack and traced it to a depth of two and a half inches, and

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found that it turned, and took a hammer weighing about three pounds and struck on said rock, but after probing the crack and ascertaining that it turned he made no further investigation of it; that he did not test said rock with a rock crowbar or other implement; that by close examination Richards might have had full knowledge of the character of said crack and the danger thereof; that on the morning before the accident resulting in Miller's death Richards again climbed up and saw said crack, but he made no test that morning to discover the true character and danger of said crack other than he had the evening before; that with full knowledge of the existence of said crack he ordered Miller to work at the place where he was killed, without giving Miller any notice of the existence of such crack, or that he had examined it; that said rock which fell was of three or four tons weight.

"That said Richards took no steps after the discovery of said crack to test the depth of the crack or strength of the rock, and used no precaution, which he might have done, to loosen or to prevent the falling down of said stone, or to brace or in any way prevent said stone from falling, or said crack from opening; that after he discovered the crack he removed some of the bagging, dirt and support in front of the stone and near and beneath the crack; that said bagging and dirt had been placed there as a brace to the wall; that after said crack was discovered by Richards the stone might have been taken down.

"That said Miller had no knowledge of the existence of said crack in said rock, or of the fact that he was in peril; that Richards, with a full knowledge of the liability of said rock to fall down and upon said Miller by reason of said crack, put him at work at that point."

It is further stated in the finding that said Richards had knowledge of the dangerous condition of said rock the day before the accident; that he might have taken the rock down and prevented the injury, but instead of doing so he negli-

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gently and carelessly put Miller at work where it might fall and injure him, and where it did fall and cause the death of Miller; that at the time Richards ordered the said Miller to work at the point where he was killed, he knew that the rock was cracked and liable to fall and kill him, and the rock did fall and kill him, and that the said Richards, knowing the condition of said rock, negligently and carelessly ordered and required him to work at said point, and said Miller was without fault.

The special verdict contains much irrelevant matter, conclusions, and even statements of evidence, also recapitulates, and is unnecessarily long, but it contains sufficient facts to show that the defendant did not provide a safe place for the deceased to work; that the foreman, entrusted with the superintendency of the work, and acting for the master, had full knowledge of the dangerous character of the tunnel, and the liability of the rock to fall and kill the deceased; that he might, with reasonable diligence, have guarded against the danger; that the death of Miller was caused by his negligence, and that Miller was without fault, and had no knowledge of the dangerous condition of the tunnel, or the crack in the rock, or its liability to fall and injure him.

It is the settled law of this State that an employer must use ordinary care and reasonable skill to make safe the place where he requires his employees to work, and that this is a duty which rests upon the employer, and which he can not delegate, and the employer can not escape this responsibility by delegating the duty of looking after and providing a safe place to any other person. If the employer delegates such duty to another, such person acts for the employer, and if such duty is negligently performed the employer is responsible.

In this case the foreman, Richards, had exclusive control of the work and of providing a safe place for the employees to work, and in the discharge of this duty he acted for the master, and was not a fellow-servant of the deceased, and

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the defendant is liable for his negligence in failing to provide a safe place for Miller to work. The facts found clearly show negligence on the part of Richards in providing a safe place for Miller to work, and that Miller's death was the result of such negligence, and that Miller had no knowledge of the unsafe condition of the tunnel, or of the peril he was in at the point where he was ordered to work and was at work, and that he was without fault. *Brazil Block Coal Co. v. Young*, 117 Ind. 520.

In the case of *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, the court say: "It is undoubtedly the duty of the employer to provide the employee with a safe working place and with safe machinery and appliances." Again the court say: "This duty is one which the law enjoins upon the master, and it is one which can not be so delegated as to relieve him from responsibility. The agent to whom it is entrusted, whatever his rank may be, acts as the master in discharging it. He is in the master's place." *Krueger v. Louisville, etc., R. W. Co.*, 111 Ind. 51; *Wright Fire-Proofing Co. v. Poczekai*, 22 N.E. Rep. 543.

The appellee was entitled to judgment on the special verdict, and there was no error in overruling appellant's motion for judgment in its favor on the special verdict.

Judgment affirmed, with costs.

Filed May 27, 1890.

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No. 14,132.

THE STATE, EX REL. WALL, v. FLEMING ET AL.

COUNTY CLERK.—*Ministerial Duty*.—*Statute Defining*.—Section 1213, R. S. 1881, provides that where an issue involving the question of suretyship is made between defendants jointly sued, if the issue be found in favor of the surety, the court shall make an order directing the sheriff to levy the execution first upon and exhaust the property of the principal before a levy shall be made upon the property of the surety, "and the clerk shall endorse a memorandum of the order upon the execution."

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**SAME.—Execution.—Failure to Endorse Order to Exhaust Principal's Property.**

**—Liability for Neglect.**—The complaint in an action by a surety against the clerk of the court and the sureties on his official bond, based upon the above statute, alleged that the clerk of the court failed to set out the order of the court in the execution directing the sheriff to levy the execution first upon the property of the principal and to endorse a memorandum of the order thereon as required, and that in consequence the property of the plaintiff instead of that of the principal was sold to satisfy the execution, which to prevent further loss he was required to redeem. It further alleged the possession by the principals, at the time the execution was issued, of sufficient property to have satisfied the execution, but that "soon after the levy and sale of the property of the surety they became insolvent, and have continued so."

**Held,** that the complaint is insufficient, and demurrable, since it fails to allege such a state of facts as to show affirmatively that the plaintiff suffered loss and that the loss was occasioned by the officer, it not appearing by the averments of the complaint of what character the property was, or whether or not it was subject to execution, for, if so, the plaintiff, subrogated to the rights of the judgment creditor, could have seized the property for his reimbursement.

From the Jay Circuit Court.

*C. Corwin* and *J. M. Smith*, for appellant.

*D. T. Taylor* and *R. H. Hartford*, for appellees.

**MITCHELL, J.**—Fleming, as clerk of the circuit court of Jay county, and the sureties on his official bond, were sued by James A. Wall, as relator, to recover damages for an alleged failure of the clerk to perform an official duty imposed upon him by the statute. Section 1213, R. S. 1881, is to the effect that where an issue involving the question of suretyship is made between defendants jointly sued, if the issue be found in favor of the surety, the court shall make an order directing the sheriff to levy the execution, first upon and exhaust the property of the principal, before a levy shall be made upon the property of the surety, "and the clerk shall endorse a memorandum of the order on the execution." It appears that a judgment had been recovered against the relator and two others, in the circuit court of Jay county, and that upon an issue duly made between him and his co-defendants he had been adjudged surety, and an

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order had been made by the court as provided by the above statute. The relator complains that the clerk failed to set out the order of the court in the execution afterwards issued upon the judgment, and that he neglected to endorse a memorandum of the order thereon as required, and that the sheriff, in order to satisfy the execution, levied upon and sold his property, which he was afterwards, in order to prevent further loss, required to redeem at a cost of \$519.91. He avers further, that at the time the execution was issued the principals were possessed of sufficient property to satisfy the execution, but that "soon after" the levy and sale of his property they became and have ever since continued to be insolvent.

The court held the complaint insufficient and gave judgment accordingly upon demurrer.

The law is settled that a ministerial officer who is charged by statute with an absolute and certain duty, in the performance of which another has a special and personal interest, is liable to make compensation to the extent of any actual loss sustained by the person specially interested, in case the officer refuses or neglects to perform his duty. *State, ex rel., v. Davis*, 96 Ind. 539; *State, ex rel., v. Davis*, 117 Ind. 307; *Clark v. Miller*, 54 N. Y. 528; 1 Sutherland Damages, 246. The rule is different in case the duty to be performed depends upon the right exercise of the judgment of the officer. A public officer is not liable for a mere mistake of judgment. *Kendall v. Stokes*, 3 How. U. S. 87; *State, ex rel., v. Egbert*, 123 Ind. 448.

The rigorous severity of the rule which treated the judgment or debt, the collection of which had been delayed or impaired by the default of a public officer, as the debt of the latter, has been very properly relaxed. Compensation for actual damage resulting from the negligent act of the officer is now the general rule. *Dow v. Humbert*, 91 U. S. 294; *State, ex rel., v. Davis, supra*.

Conceding that the clerk failed or neglected to perform an



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absolute and certain duty, in the observance of which the relator was specially interested, and which he had a right to call upon him to perform, it becomes pertinent to inquire in what manner the latter was injured by his neglect. In order to make the complaint sufficient such a state of facts must appear as to show affirmatively that the relator sustained loss, and that the loss was occasioned by the neglect of the officer.

The averments in the complaint in respect to the property owned by the principal debtors at the time the execution was issued are ambiguous. It does not appear whether it was real or personal estate, nor is it averred that the property was subject to execution. The averment is that they "had sufficient property out of which such execution could have been made."

If we assume that the property was subject to execution, then, whether it was real or personal, it was affected with a lien to which the relator, whose suretyship had been duly declared, was subrogated the moment the debt was paid by the sale of his property. *Rooker v. Benson*, 83 Ind. 250; *Pence v. Armstrong*, 95 Ind. 191; *Gerber v. Sharp*, 72 Ind. 553; section 1214, R. S. 1881.

The relator's status as surety having been fixed by the judgment, it was only necessary for him, when he had paid the debt, to take out a new execution for his own use, and if the principal debtors had property subject to execution sufficient to pay the debt, we can perceive no reason why it could not have been seized for the reimbursement of the surety. If they had no property subject to execution then the relator was not injured by the failure of the clerk.

For all that appears the situation of the principal debtors remained the same in respect to their property at the time the relator paid the judgment as at the time the execution issued. The averment is that they became insolvent "soon after" the relator's property was sold. This indicates no time at all that can be taken notice of. If an execution had

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issued for the relator's benefit on the day his property was sold, he would have been in as favorable a situation, so far as appears, as if the clerk had not made the mistake.

One who has suffered, or is about to suffer, injury from the neglect or default of another, can not stand supinely by, but must use all reasonable diligence to make the damages as light as possible. When the relator discovered that the clerk had neglected his duty in issuing the execution, it was incumbent upon him to use all proper and reasonably available means to have the mistake corrected and to protect himself by using the means the law provided for his indemnity. *Louisville, etc., R. W. Co. v. Sumner*, 106 Ind. 55; 1 Sutherland Damages, 151.

From all that appears the neglect of the clerk may have resulted from a mere innocent mistake, which would have been corrected upon request, and while this would afford no defence so far as actual and unavoidable loss resulted, it serves to support the reasonable doctrine that actual and unavoidable loss must be shown to have resulted from the mistake of the official before a right to recover anything more than nominal damages ensues.

The judgment is affirmed, with costs.

Filed May 27, 1890.

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124	101
133	696
124	101
165	96

No. 14,246.

## MILLER v. COOK.

**SLANDER.—Express Malice.—Declarations of Defendant Tending to Show.—Admissibility.**—In an action for slander the testimony of a witness tending to show that the defendant knew that the charges he made against the plaintiff were unfounded, is competent for the purpose of proving express malice.

**SAME.—Fraudulent Conveyances by Defendant.—Evidence of.**—At the time of the publishing of slanderous words the plaintiff occupies the position

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of a creditor and may prove that certain fraudulent conveyances were made by the defendant.

**SAME.—*Defendant's Financial Condition.***—Proof that the defendant, after being threatened with an action for slander, made voluntary conveyances of his property, was competent for the purpose of showing the financial condition of the defendant.

**SAME.—*Impeachment of Witness.***—The rule permitting a party to contradict his own witness applies only where the testimony is a surprise to the party calling him, and is prejudicial; and, hence, a witness called by the defendant having denied, in answer to a question, that he had sexual intercourse with the plaintiff, it was not competent to prove by other witnesses other declarations of the witness to the contrary.

**SAME.—*Evidence.***—A witness for defendant testified that he had a conversation with the defendant in March, which the defendant denied, offering to prove that the conversation took place in November, and to state what was said.

**Held,** no impeaching question having been asked the witness, that the testimony of defendant as to the conversation in November was incompetent.

**SAME.—*Specific Acts of Impropriety.***—Specific acts of impropriety committed by the plaintiff long after slanderous words are spoken, are not competent evidence.

From the Pike Circuit Court.

*E. A. Ely and J. W. Wilson*, for appellant.

*F. B. Posey, A. H. Taylor and E. P. Richardson*, for appellee.

**ELLIOTT, J.**—The appellee recovered judgment against the appellant for damages, upon a complaint charging that the latter had uttered and published slanderous words of her, imputing to her conduct such as a chaste woman would not be guilty of, and thus assailing her character for chastity. The questions argued arise on the ruling denying a new trial.

The testimony of the witness Stillwell was competent for the purpose of proving express malice, for it tended to show that the defendant knew that the charges he made against the plaintiff were without foundation. If a defendant makes declarations tending to show that he had such knowledge of the plaintiff's conduct and character as apprised him that charges against her were unfounded he has no reason to com-

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plain if his declarations are used as evidence against him. There is no force in the objection that the evidence was not competent at the time it was offered, for, if it be conceded that it was not then competent, still there was no error in this instance, for evidence was subsequently introduced which made it competent.

The deeds executed by the appellant were voluntary, and the evidence tends strongly to show that they were made to defraud the appellee in the event that she should obtain a judgment. At the time the slanderous words were published the appellee occupied the position of a creditor and had a right to prove that fraudulent conveyances were made by the appellant. *Bishop v. Redmond*, 83 Ind. 157; *Shean v. Shay*, 42 Ind. 375; *Rogers v. Evans*, 3 Ind. 574; *Wright v. Brandis*, 1 Ind. 336; *Smith v. Culbertson*, 9 Rich. 106; *Damon v. Bryant*, 19 Mass. 411. But aside from this consideration, the evidence was competent for the purpose of showing the financial condition of the appellant. That such evidence is competent is well settled. *Wilson v. Shepler*, 86 Ind. 275; *Justice v. Kirlin*, 17 Ind. 588. Some of the authorities assert that the voluntary conveyance of property after action is threatened or brought is competent as an implied admission, but we do not care to decide anything upon that question, for the evidence was competent upon other grounds, and the ground upon which we hold the evidence competent is, that it tended to show the defendant's financial condition.

James Stevens, one of the witnesses for the appellee, testified as to a conversation which he had with the appellant in March, 1887, and the latter testified that he had no conversation with Stevens in March, and offered to testify that he did have a conversation with him in November, and offered to state what that conversation was. Had Stevens been asked the proper impeaching question it is probably true that the appellant would have had a right to testify as to what was said in November, but no such impeaching

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question was asked; so that the question is whether the offered testimony was competent as original evidence. It is clear that it was not competent for the defendant to get before the jury his own statements as original evidence. He might have contradicted Stevens as to the conversation testified to by him, but he could not make original evidence his own declarations made in a distinct and different conversation.

The appellant asked a witness called by him whether he, the witness, ever had sexual intercourse with the appellee, and he answered that he had not. He subsequently offered to prove by other witnesses declarations of the witness to the effect that he did have carnal intercourse with the appellee, but the court excluded the offered testimony. In this there was no error. It was rightly ruled that the appellant could not get the declarations of the witness before the jury in the manner he attempted to do, for the witness sought to be impeached had not testified to anything prejudicial to the appellant; he had, indeed, given no positive testimony at all. The rule permitting a party to contradict his own witness is statutory and applies only where the testimony given is a surprise to the party calling him and is prejudicial. *Hull v. State, ex rel.*, 93 Ind. 128; *Conway v. State*, 118 Ind. 482; *Champ v. Commonwealth*, 2 Met. (Ky.) 17. The statutory rule is not one to be extended to such a case as this.

We very much doubt whether any of the specific acts of impropriety and indecent conduct which the appellant offered to prove would have been competent matters of evidence, even had they been committed before the slanderous words were published, but as they were committed long after the slanderous words were spoken there is no doubt in our minds that they were not competent. *Shewalter v. Bergman*, 123 Ind. 155; *Beggarly v. Craft*, 31 Ga. 309 (76 Am. Dec. 687); *Thompson v. Nye*, 16 Q. B. 175; *Bathrick v. Detroit, etc., Co.*, 50 Mich. 629.

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The verdict is well supported by the evidence, and settled rules of law forbid us from interfering with the assessment of damages made by the jury.

Judgment affirmed.

Filed May 27, 1890.

No. 14,348.

JOHNSON ET AL. v. JOUCHERT ET AL.

**MARRIED WOMAN.**—*Separate Estate.*—*Power to Convey.*—A married woman has no power or capacity to convey or encumber her separate real estate except by a deed in which her husband shall join. Section 5117, R. S. 1881.

**SAME.**—*Unity of Husband and Wife.*—*Common Law Rule as to.*—*How Far in Force in this State.*—The common law rule respecting the unity of husband and wife prevails to such an extent in this State as to render nugatory any attempt by a married woman to convey her separate real estate directly to her husband, unless the transaction can be sustained upon the principles of equity.

**SAME.**—*Separate Estate.*—*Mortgage on.*—*When Valid.*—A mortgage properly executed by a married woman upon her separate real estate is a valid and binding security, unless it constitutes a contract of suretyship within the meaning of section 5119, R. S. 1881.

**SAME.**—*Mortgage of Wife's Separate Estate to Secure Husband's Debt.*—*Conveyance.*—*Grantees.*—*Plea of Coverture.*—Mrs. G. attempted to convey her separate real estate to her husband by a warranty deed, in order, by such conveyance, to enable her husband to mortgage it as a security for a loan. The note of the husband, for the money borrowed, was secured by a mortgage on the land in which both husband and wife joined. The husband expended a portion of the money borrowed in the purchase of real estate, the title to which was taken in the name of his wife, and in making improvements on the land purchased for her. Afterwards the husband and wife conveyed the land mortgaged by warranty deed to S., who subsequently conveyed by like deed to J. J. and G. J.; the latter brought suit to quiet title, and to have the mortgage executed by the husband and wife cancelled.

**Held,** that to the extent the money was expended in purchasing real estate for the wife, and making improvements thereon, the mortgage was not a

124	105
126	62
124	105
131	51
131	270
131	542
124	105
136	381

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contract of suretyship, but a valid encumbrance on the land when conveyed to the plaintiffs; and that, as to the residue, since the loan which the mortgage was given to secure was made to her husband, and applied to his personal use, the wife occupied the relation of surety, and the mortgage was invalid.

*Held*, also, that the grantees, the plaintiffs, could not set up the coverture of the wife, it being a personal defence, and have the mortgage cancelled.

**SAME.**—*Plea of Coverture.—How Far Personal Privilege.*—The plea of coverture is so far the personal privilege of a married woman, or of those who are privies in blood, or in representation with her, that before any third person can plead it in her behalf it must affirmatively appear that it is made for her benefit and with her consent, or that in equity and good conscience the person setting up the defence should be permitted to do so in order to protect a consideration actually paid her without notice of the invalid encumbrance, or with the mutual intention and agreement that he should be permitted to set up its invalidity.

From the Gibson Circuit Court.

*T. R. Paxton and L. C. Embree*, for appellants.

*C. A. Buskirk*, for appellees.

**MITCHELL, J.**—The questions for decision arise out of the following facts:

In January, 1884, Mrs. Grubbs, wife of Thomas J. Grubbs, was the owner of forty acres of land in Gibson county which she inherited from her father. She attempted to convey the land directly to her husband by a deed containing covenants of warranty, her purpose in making the conveyance being to enable her husband to mortgage it as security for a loan of four hundred dollars, which he had negotiated from the agent of Jouchert. The money was loaned, and the note of Grubbs, secured by a mortgage on the land, in which both husband and wife joined, was taken as evidence of the debt. The husband expended \$287 of the money borrowed in the purchase of real estate, the title to which was taken in the name of his wife, and in making improvements on the land purchased for her. Afterwards Grubbs and wife conveyed the land mortgaged by warranty deed to Smith, who subsequently conveyed by like deed to the appellants, John W.

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and George W. Johnson. The latter brought this suit for the purpose of having their title quieted and the mortgage executed by Grubbs and wife cancelled.

The conclusions stated by the court were to the effect that the mortgage was void as to the wife, but that the plaintiffs below, as subsequent purchasers of the land, under the ruling in *Bennett v. Mattingly*, 110 Ind. 197, could not avail themselves of her coverture for the purpose of avoiding the mortgage.

The conveyance from Mrs. Grubbs to her husband was a nullity. A married woman has no power or capacity to convey or encumber her separate real estate except by deed in which her husband shall join. Section 5117, R. S. 1881.

Any conveyance executed by her in which her husband has not joined is absolutely void, because of the want of capacity on her part to convey or encumber her real estate by such an instrument. *Cook v. Walling*, 117 Ind. 9. Besides, the common law rule respecting the unity of husband and wife prevails to such an extent in this State as to render nugatory any attempt by a married woman to convey her separate real estate directly to her husband unless the transaction can be sustained upon the principles of equity. *Barnett v. Harshbarger*, 105 Ind. 410; *Harrell v. Harrell*, 117 Ind. 94; *Preston v. Fryer*, 38 Md. 221; *Gebb v. Rose*, 40 Md. 387; 9 Am. and Eng. Encyc. of Law, pp. 789-791; *Jenne v. Marble*, 37 Mich. 319; 28 Cent. Law Jour. 438.

The conveyance from Mrs. Grubbs to her husband is, therefore, to be eliminated from the case, and the facts are to be considered as though she joined in a mortgage on her separate real estate to secure a loan of money negotiated by and made to her husband, who employed \$287 of it in purchasing and improving other real estate for her, and the residue for his own personal benefit.

To the extent that the money borrowed was invested in property, the title to which was taken in the name of Mrs. Grubbs, for her separate use and benefit, the mortgage con-



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stituted a valid security. A mortgage properly executed by a married woman upon her separate real estate, is a valid and binding security unless it constitutes a contract of suretyship within the meaning of section 5119, R. S. 1881.

Strictly speaking, a contract of suretyship is an engagement whereby one person undertakes to answer for the debt, default or miscarriage of another, but the relation of surety may arise out of arrangements or equities between the parties to a contract, without any regard to its form. One whose relation to a contract or transaction is such as to entitle him to be indemnified in case he is compelled to pay a debt or perform an obligation for which he is bound with another, in order to relieve himself from personal liability or discharge his property from an encumbrance, may be said to stand in the relation of surety. *Sefton v. Hargett*, 113 Ind. 592; *Smith v. Sheldon*, 35 Mich. 42; *Wendlandt v. Sohre*, 37 Minn. 162.

One who has received, and who retains, the consideration or benefit of a contract can not, in equity, occupy the attitude of a surety. Accordingly, it has been held again and again that, where money was borrowed by a wife, or by a husband and wife, or by either of them, for the purpose of discharging liens on the wife's separate property, or for a purpose which enures to the benefit of her estate, a mortgage properly executed on her separate property to secure the repayment of money so borrowed may be enforced. *Noland v. State, ex rel.*, 115 Ind. 529, and cases cited. "With respect to contracts for her own benefit, or for the benefit of her estate, the power of a married woman is plenary." *Jouchert v. Johnson*, 108 Ind. 436. To the extent that the consideration of a contract, or security enures to the benefit of a married woman, she occupies the attitude of a principal, for the plain reason that she would have no equitable right to be indemnified by some one else in case the contract or security should be enforced against her. *Vogel v. Leichner*, 102 Ind. 55.

A married woman, by force of section 5119, is protected, as at common law, in all transactions which do not relate to or benefit her separate estate, or business, or which are not to her personal benefit, but such as relate to or benefit her separate estate or her lawful business transactions, will be binding upon her. *Haydock, etc., Co. v. Pier*, 74 Wis. 582.

Although the facts found are not very definite upon the point, it may fairly be assumed that all the parties to the transaction knew of the purpose for which the money was borrowed. The creditor who took a mortgage on the separate estate of a married woman, as security for a loan made ostensibly to her husband, was bound, at his peril, to inquire; and since Mrs. Grubbs received and, so far as appears, retains the title to property purchased and paid for out of the money borrowed, it will be presumed that she had knowledge, and that she executed the mortgage upon the consideration that the principal part of the money was to be used in augmenting her separate estate. In respect to the money borrowed and thus applied, she would have no standing in a court of equity to enforce indemnity against her husband in case she is compelled to pay the debt. The conclusion follows, that to the extent of \$287, with the interest accumulated thereon, the mortgage was not a contract of suretyship, but a valid encumbrance on the land when it was conveyed to the appellants. In respect to the residue, since the loan which the mortgage was given to secure was made to her husband and applied to his personal use, she occupied the relation of surety, and the mortgage was invalid. The inquiry remains, can the appellants, who are remote grantees of Mrs. Grubbs, avail themselves of the invalidity of the mortgage?

The court below was of the opinion that, although the mortgage was void *in toto*, the appellants, as subsequent grantees, were not in a situation to avail themselves of its invalidity. A parallel is supposed to exist between the civil acts, contracts and deeds of married women and those of infants, and it has been said that coverture, like infancy,

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is a personal defence, and hence one which can not be made by a third party for his own benefit. *Bennett v. Mattingly*, *supra*; *Ætna Ins. Co. v. Baker*, 71 Ind. 102; *Crooks v. Kennett*, 111 Ind. 347. This statement is true in a limited and qualified sense. The contracts of infants, according to modern classification, are either valid or voidable, while that of married women are, as a rule, either void or voidable. The contracts of infants, which are voidable at the election of the infants, are distinguishable from those of married women, which, owing to the disability of coverture, are void at common law, and when constituting contracts of suretyship, are expressly so declared, as to her, by statute. *Kent v. Rand*, 25 Am. Law Reg. 781; *Musick v. Dodson*, 22 Am. Law Reg. 522.

In respect to voidable contracts the established rule is that the person whose disability renders the contract voidable, or those in privity of blood or in representation, can avoid it. Such a contract can not be avoided by privies in estate without the co-operation of those whose personal privilege it is to disaffirm or avoid it, unless that which is equivalent to a disaffirmance or avoidance has already taken place. *Harris v. Ross*, 112 Ind. 314; *Shrock v. Crowl*, 83 Ind. 243; *Price v. Jennings*, 62 Ind. 111; *Breckinridge v. Ormsby*, 1 J. J. Marsh. 236 (19 Am. Dec. 71). But where a deed or contract is absolutely void, and to enforce it as though it were valid would operate to the injury of the person who made it, or to the prejudice of a third person who is in privity of estate with the person who made it, the proposition can not be maintained as universally true that one who is in privity of estate can not set up the invalidity of the contract or deed. *State, ex rel., v. Kennett*, 114 Ind. 160, and cases cited. For example, by the common law a married woman had no power to convey or encumber her separate real estate, and under the statute she has no power to do so except by deed in which her husband shall join. The mere fact of coverture, under any and all circumstances,

disqualifies her to convey or encumber her real estate, except in the manner prescribed, and a conveyance made in disregard of the prescribed manner is an absolute nullity and can not operate, even by way of estoppel or otherwise. *Cook v. Walling, supra*; *Rogers v. Union Cent. Life Ins. Co.*, 27 Am. Law Reg. 48, and note.

It would hardly be claimed that a mortgage executed by a married woman in which her husband had not joined, could nevertheless be enforced against a subsequent purchaser without notice who had paid the full purchase-price for the land. But we need not pursue the general subject further. While the statute prohibits a married woman from entering into any contract of suretyship, and declares all such contracts void as to her, it is nevertheless true that the restraint is imposed upon her solely for her benefit. As is, in effect, said in *Sutton v. Aiken*, 62 Ga. 733 (741), the purpose of the statute is economical, not moral, and its policy is in favor of a class, and not of the public at large.

It is not wicked or immoral for a wife to pay her husband's debts, nor has the public an interest in compelling her to abstain from doing so. *Brodnax v. Aetna Ins. Co.*, 128 U. S. 236.

A married woman may have entered into a contract of suretyship under such circumstances as to be legally and morally estopped from asserting that she should not be held as principal. *Rogers v. Union Cent. L. Ins. Co.*, 111 Ind. 343; *Lane v. Schlemmer*, 114 Ind. 296.

Moreover, she may have elected, for other sufficient reasons, to perform her contract, invalid though it be, and until it appears that her grantee will be injuriously affected by her election a court of equity will not lend its aid merely to take money from one stranger and put it into the pocket of another. *Stiger v. Bent*, 111 Ill. 328.

While a contract such as that under consideration is declared to be void, yet in order to make its invalidity available the coverture of the mortgagee must be set up as a de-

fence. In the absence of any facts or circumstances making it appear that in equity and good conscience the owner of the land should be permitted to set up the invalidity of the mortgage, the mortgagor has the primary right to elect whether she will avail herself of the defence of coverture or not.

An usurious contract may be void, but the promisor may elect to perform it. If he chooses to do so, and no one else has been injured by it, no one has the right to say that he may not waive the defence of usury. *Union Nat'l Bank v. International Bank*, 123 Ill. 510. Those who are in privity of estate with the borrower may set up the defence for their own protection under certain circumstances.

Thus it is laid down that one who has purchased land with the expressed intention on his part and that of the grantor to avoid a previous invalid mortgage, may make the defence; or when the purchaser has in no way agreed to pay the mortgage debt, or where it has not been agreed that the debt should be deducted out of the purchase-price, he may take advantage of the invalidity of a mortgage and avoid it. *Newman v. Kershaw*, 10 Wis. 333; *Sudington v. Harris*, 21 Wis. 239; *Jones Mortg.*, section 745.

The statute prohibits a married woman from entering into a contract of suretyship, and declares that "such contract as to her shall be void."

As was said in *Bennett v. Mattingly*, *supra*, the provision against married women becoming sureties was intended for their protection alone, and the defence of coverture can not be made solely for the benefit of a third person. A stranger, in other words, can not interfere between a married woman and the person with whom she contracted, and by pleading her coverture save the money due on an invalid contract merely to put it in his own pocket. *Studabaker v. Marquardt*, 55 Ind. 341.

If one in privity of estate with a married woman should make it appear that the plea of coverture would enure to

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her benefit, or protect her from liability on the covenants in her deed, or that he paid her the consideration of an invalid encumbrance upon a mutual agreement that he should have the right to avoid it, a different question would be presented, and one which might require further consideration of the questions in *Crooks v. Kennett, supra*.

For all that appears in the present case the amount of the debt secured by the mortgage sought to be cancelled may have been deducted from the purchase-price. In that event Mrs. Grubbs would have paid the debt, and the plea of coverture would be wholly for the benefit of her grantees, who have the money in their pockets. The plea of coverture is so far the personal privilege of a married woman, or of those who are privies in blood, or in representation with her, that before any third person can plead it in her behalf it must affirmatively appear that it is made for her benefit and with her consent, or that in equity and good conscience the person setting up the defence should be permitted to do so in order to protect a consideration actually paid her without notice of the invalid encumbrance, or with the mutual intention and agreement that he should be permitted to set up its invalidity.

These conclusions lead to an affirmance of the judgment.  
Judgment affirmed, with costs.

Filed May 27, 1890.

124	113
133	572
134	113
141	54
124	113
150	477

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No. 14,200.

**BUNTING v. GILMORE ET AL.**

**MORTGAGE.—Priority of Liens.—Subrogation.**—B., the plaintiff, took a conveyance from G. of land subject to a school fund mortgage, which had been foreclosed, agreeing to redeem from the sale which had been made, and to pay certain judgments against the owner. On compliance with cer-

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tain named conditions G. was to retain possession of the land, for which he had given an absolute deed to B., and it was agreed that if G. should sell the land for an amount sufficient to pay the sums expended by B., with interest, B. should reconvey the land. The defendant, although when the arrangement was made he had a mortgage lien which was superior to the judgment liens, and the payment of the money otherwise expended, urged B. to make the arrangement and to redeem the land, informing B., who had no notice to the contrary, that he had no demands against it. B. relied upon the representations, believing them to be true, and acted upon them, taking a conveyance and making the agreement as above stated.

*Held*, that B. was entitled to be subrogated to the lien of the school fund mortgage, the defendant being estopped to set up his mortgage.

*SAME.—Exhibit not Properly Part of Complaint.—Description in Complaint Controls.*—Where the description of the land in an exhibit not properly a part of the complaint differs from the description in the complaint, the complaint will control.

From the Knox Circuit Court.

*H. S. Cauthorn and J. M. Boyle*, for appellant.

*W. H. De Wolf, S. N. Chambers and E. H. De Wolf*, for appellees.

**BERKSHIRE, C. J.**—This action was brought by the decedent, who departed this life after the taking of this appeal.

The complaint in substance is, that heretofore, to wit, on the 26th day of February, 1870, William R. Gilmore and Louisa Gilmore executed to the State of Indiana, for the use of the common school fund, a mortgage upon certain real estate therein described, to secure the payment of a promissory note bearing the same date, executed by the appellee, William R. Gilmore; that the said mortgage was duly recorded; that after the execution of said mortgage, and subject thereto, the said William R. Gilmore and Louisa Gilmore conveyed the said real estate to Robert L. Gilmore, who at the time had actual notice of said mortgage; that after the conveyance of said real estate to the said Robert L. Gilmore the said school fund mortgage was foreclosed in the Knox Circuit Court, in an action against the said Robert L. and Louisa Gilmore, the decree and judgment of said court bearing date

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October 21, 1881, the sum for which judgment was rendered being \$320.90, and costs; that a certified copy of said decree issued to the sheriff of Knox county, who afterwards sold said real estate to Fuller, DeWolf and Chambers for \$362, that being the amount of said judgment, including interest and costs, and on the 31st day of December, 1881, issued to them a certificate of purchase; that afterwards, and when the time for redemption was about to expire, the decedent and the said Robert L. Gilmore entered into a written agreement, signed alone by the decedent, to the effect following: "Whereas, Robert L. Gilmore has this day deeded to Samuel A. Bunting his farm in Steen township, Knox county, Indiana. Now, this writing witnesseth, that Samuel A. Bunting, in consideration of said conveyance, entered into the following agreement: He agrees to redeem said land from the sheriff's sale made December 31, 1881. He agrees to pay the following judgments against said Gilmore: a judgment in the Knox Circuit Court in favor of the Vincennes National Bank, assigned to Smiley N. Chambers *et al.*; the remainder which is still unpaid on two certain judgments of Preston *et al.*, against said Gilmore, rendered before Esquire Hilburn, transcripts of which are filed in the said circuit court; a judgment of Carroll and Bunte against Gilmore in said circuit court; the expense of said redemption, and looking after said judgments, taxes assessed and to accrue on said land. The amount of these several judgments is to be ascertained and kept account of by said Bunting. Said Gilmore is to have possession of said farm until September 1, 1883, and if at that time he shall pay to said Samuel A. Bunting two hundred dollars, he is to have possession of said farm until September 1, 1884; if at said last mentioned time he shall pay to said Samuel A. Bunting the sum of three hundred dollars he is to have possession of said farm until September 1, 1885; and if by said last mentioned day he shall pay to said Bunting the further sum of three hundred dollars then he is to have possession of said farm until the



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1st day of September, 1886. It is further agreed, that if, at any time, said Gilmore shall sell said land for an amount sufficient to pay and satisfy the debts and amounts paid by said Bunting as above set forth, together with eight per cent. interest on the above sums from the date of said payments, and said purchaser shall tender to said Bunting said sums with interest as aforesaid, then in that case said Bunting agrees to convey the fee simple of said real estate, by a good and sufficient deed, to said Gilmore, or said purchaser; or in case said Gilmore can borrow said sum of money due said Bunting, and the lender shall be ready to pay him his full debt, then in that case said Bunting agrees to convey said land as aforesaid. This writing to be void in case said redemption shall be ineffectual. Witness the hand of said Samuel A. Bunting, this 1st day of January, 1883.

"SAMUEL A. BUNTING."

That on the same day the said Robert L. Gilmore executed to said decedent a deed for said real estate, and the latter paid to the clerk of the Knox Circuit Court the sum of \$392, and redeemed said land from said sale; that before the execution of said agreement, D. M. Osborn & Co. had caused an execution to issue on a judgment in the Knox Circuit Court in their favor against said Robert L. Gilmore, rendered on the 15th day of February, 1881, and levied on the land in question, but which remained unsold, and that afterwards a vendi. issued thereon and executions were also issued on the said judgments in favor of the said national bank; on the 3d day of March, 1883, the said real estate was sold by the sheriff to satisfy said vendi. and said other executions to Fuller, DeWolf and Chambers, for the sum of \$423.36, and a certificate of purchase issued to them, and afterwards the appellant's decedent paid to the said purchasers the amount due them on account of their said purchase and took an assignment of said certificate to Thomas and Halleck Bunting, two of his sons, for his own benefit, and the year for redemption having expired, and there hav-

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ing been no redemption from said sale, the sheriff of said county of Knox executed a deed to them for said real estate, bearing date May 27th, 1884; that the appellant's said decedent paid and satisfied all of said judgments, including the judgment of D. M. Osborn & Co., which was not covered by his said agreement; and besides all of said judgments there is due to his estate on account of expenses incurred in redeeming from the said sale made on the judgment and decree in favor of the State of Indiana, and in looking after said other judgments, the sum of \$100, and that no part of said sums of money so laid out and expended was ever repaid to the decedent, nor did the said Robert L. Gilmore ever pay to him any part of said sums as stipulated in said agreement to be paid by him; that after the execution of said school fund mortgage by the appellee and said Louisa Gilmore, and the execution of their said conveyance to Robert L. Gilmore, the latter executed a mortgage to the appellee on the same real estate to secure the payment of \$800, but by mistake other land was described in said mortgage, and containing such misdescription said mortgage was duly recorded; that on the 4th day of February, 1887, said appellee obtained a judgment against said Robert L. Gilmore, in the Knox Circuit Court, for the sum of \$1,231.80 and costs, and a decree for the sale of said real estate, and an order of sale having issued upon said decree, the appellee purchased said real estate at sheriff's sale, March 19th, 1887, for the sum of \$1,343.58, that sum being the amount of said judgment including interest and costs, and now holds the sheriff's certificate therefor; that at the time of the execution of said agreement, and the payment of said sum of money as above stated, the said decedent had no actual notice of the execution of said mortgage by said Robert L. Gilmore to the said appellee, and had no knowledge whatever thereof other than the notice which the record of said mortgage furnished; that at and before the execution of said agreement by the said decedent, the appellee falsely and

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fraudulently represented to the decedent that he had no demands against said real estate, and urged the decedent to redeem said lands for the said Robert L. Gilmore from the said sheriff's sale which had then been made, and that the decedent relied upon said representations as truthful, and in pursuance thereof, and because of the solicitations of the appellee, entered into the said agreement and made the payments as above stated; that the said Robert L. Gilmore was, at the time of said transactions, and still is, insolvent.

Then follows a prayer for subrogation and for all equitable relief to which the appellant may be entitled.

The appellee addressed a demurrer to the complaint, which was sustained by the court, and the appellant reserved an exception, and refusing to amend his complaint judgment was rendered against him for want of a sufficient complaint.

The only error assigned is that the court erred in sustaining the demurrer to the complaint.

The school fund mortgage is filed with the complaint as an exhibit, and the point is made that the description therein and the description as given in the complaint appear to be different, and that there is no averment that they describe the same land, hence the exhibit must control, and therefore it is not made to appear that the land described in the mortgage is the land upon which the appellant claims to have a superior lien.

A sufficient answer to this objection is that this is not an action to foreclose the school fund mortgage; it has already been merged into a judgment and decree, therefore the mortgage is not the foundation of the action, and the exhibit not properly a part of the complaint.

The next contention of the appellee is that the complaint contains no allegation that the land described in the mortgage from Robert L. Gilmore to the appellee is the land referred to in the complaint as that on which the State foreclosed its mortgage.

We think that this sufficiently appears when all the aver-

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ments in the complaint are considered. It is hardly necessary to cite authorities to the point that the relation which existed between Robert L. Gilmore and the decedent was that of mortgagor and mortgagee, but see *Tuttle v. Churchman*, 74 Ind. 311; *Hanlon v. Doherty*, 109 Ind. 37; *Turpie v. Lowe*, 114 Ind. 37.

The agreement which the decedent executed was not an agreement to pay and satisfy the claim or indebtedness which the sheriff's certificate of purchase which had been issued to Fuller, De Wolf and Chambers represented, but it was an agreement to redeem from the sale which had been made. It was not a redemption by the decedent of his own land, but a redemption as junior mortgagee.

The agreement which the decedent made was one which he had a perfect right to make, and having thus placed himself in the position of a junior mortgagee, he had an interest to protect, if that was necessary to the right of subrogation.

But the broad doctrine announced in the case of *Richmond v. Marston*, 15 Ind. 134, that a volunteer purchaser at a sale made by a public officer is not entitled to the right of subrogation in case the sale is ineffectual to convey title, has been overthrown by the later decisions of this court.

The policy of the law is to hold out inducements to persons to become purchasers at such sales, and therefore whenever a sale is ineffectual to pass the title to the property offered for sale equity recognizes the right of subrogation.

The case of *Muir v. Berkshire*, 52 Ind. 149, is directly in conflict with *Richmond v. Marston*, *supra*.

That was a sale made by a school commissioner at the court-house door, of certain real estate that had been mortgaged to the State to secure a loan from the school fund; Muir, the purchaser, was a mere volunteer, having no interest of any character to protect. Afterwards, in a litigation between his heirs and the heirs of the mortgagor, the sale was held to be absolutely void; the heirs of the mortgagor having afterwards conveyed the mortgaged premises, the

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Bunting v. Gilmore et al.

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heirs of Muir brought the action above named, claiming the right of subrogation, and demanding a foreclosure of the school fund mortgage, and the court below, following *Richmond v. Marston*, *supra*, held that their complaint failed to state a cause of action; they appealed to this court, and the judgment of the court below was reversed. See *Willson v. Brown*, 82 Ind. 471; *Bodkin v. Merit*, 102 Ind. 293; *Cockrum v. West*, 122 Ind. 372.

In the last named case the decisions of this court are collected.

If the appellant's decedent had voluntarily, and without having any arrangement with the owner of the real estate that had been mortgaged to the State, paid the amount to which Fuller, De Wolf and Chambers were entitled as purchasers at the sheriff's sale, it may be that he would have been a volunteer of that class not entitled in equity to the right of subrogation.

But, in view of the other allegations in the complaint, we think it states a good cause of action as to the judgment liens which the decedent paid, including the judgment in favor of D. M. Osborn & Co., and for money expended otherwise, as alleged in the complaint.

But for the estoppel, which we think intervenes, if the appellee's mortgage lien was senior to the said judgment liens, and the payment of the money otherwise expended by the decedent, we have no doubt but that the appellee would have the superior equity. *Peck v. Williams*, 113 Ind. 256; *Foltz v. Wert*, 103 Ind. 404.

It is averred, however, that the decedent had no actual notice that the appellee had any lien or claim upon the real estate when he received the conveyance therefor, or thereafter until after he had paid out the various sums of money as alleged in the complaint; that when he was talking of making the arrangement with Robert L. Gilmore, and at the very time of its consummation, the appellee urged him to make the arrangement and to redeem the land, and informed

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him that he had no demands against it; that the decedent relied upon the representations and believed them to be true, and, acting upon the same, accepted the conveyance and executed the written agreement and paid out the said several sums of money. These facts are all admitted by the demurrer to be true, and if not sufficient to work an estoppel we imagine that it will be a little difficult to suppose a state of facts which would have that effect.

In view of the facts alleged, to permit the appellee to enforce his judgment as against the real estate involved, as a superior lien to the equities of the appellant, would be to violate every principle in equity jurisprudence, against good conscience, and to recognize what would seem to be a most palpable fraud.

The judgment is reversed, with costs, with instructions to the court below to overrule the demurrer to the complaint.

Filed May 27, 1890.

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No. 14,130.

PECK ET AL. v. VINSON, GUARDIAN.

**CONVEYANCE.—Insane Person.—Action for Rescission.—Tender of Deed to be Signed.**—Where one takes a conveyance from a person whom he knows to be of unsound mind, and refuses to rescind the contract and reconvey the land upon demand made, claiming it as his own, he will not be allowed, when suit is brought, to defeat the action by reason of its not being alleged in the complaint that a deed was tendered to him to sign at the time he refused to convey, and asserted title to the land.

**SAME.—Complaint.—Sufficiency of.**—In an action to rescind a contract for the sale of land, and to recover the same, where a complaint alleges that the defendant, for the fraudulent purpose of procuring a conveyance of the land, ingratiated himself into the confidence of an old, infirm, and weak-minded lady, and that by feigning an affection for her, and by falsely representing to her that he was a man of means, he ob-

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tained the land, worth \$4,000 for \$1,500, which by a condition in the mortgage could not be collected for ten years, fraud is sufficiently shown.

From the White Circuit Court.

*L. Walker, A. W. Reynolds and E. B. Sellers*, for appellants.

*T. F. Palmer and A. K. Sills*, for appellee.

OLDS, J.—This was an action brought by the appellee, James V. Vinson, guardian of Catharine Delong, a person of unsound mind, against appellants, George W. Peck, Lury Peck, Joseph F. Peck and Martha Peck to rescind a contract for the sale of and to recover a tract of land in White county, Indiana.

The said Catharine Delong was the owner of the real estate in controversy, and she was an old lady about eighty years of age, of unsound mind, and incapable of managing her own estate, and the said George W. Peck was upon terms of intimacy with her, and induced her to convey the real estate, which was worth about \$4,000, for \$1,500, for which sum he executed to her ten notes of \$150 each, payable one each year for ten years, and secured them by mortgage on said real estate, providing that the same should not be foreclosed until the last note became due, in case the interest was kept paid.

The complaint is in three paragraphs, and a demurrer to each paragraph was overruled, and the ruling assigned as error.

There was a trial by the court, and a special finding of facts and conclusions of law, and judgment for appellee. Appellants also moved for a new trial, which motion was overruled, and the ruling is assigned as error.

The first and second paragraphs of the complaint are substantially the same.

Mrs. Delong was adjudged of unsound mind after the execution of the deed, and the appellee was appointed as her guardian.

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The first and second paragraphs of the complaint allege the appointment of the appellee as guardian ; that Mrs. De-long owned the land ; that it was of the value of \$4,000 ; that she was of unsound mind at the time she made the deed to George W. Peck, and that he knew she was of unsound mind ; that he induced her to make the deed to him, and paid no valuable consideration for the same ; that he executed to her his notes for \$1,500, secured by mortgage ; as the only consideration ; that he was and is totally insolvent ; that the guardian demanded a reconveyance of the real estate, and that Peck refused to do so, and an offer to surrender the notes and mortgage, and if it should be found that Peck had paid any other value for said land, to repay to him such sum as might by the court be found due, and alleging that the other defendants had some claim as a reason for making them parties.

The only objection urged to these two paragraphs of complaint is that they do not allege that at the time the guardian demanded a rescission of the contract he also tendered to George W. Peck a deed to sign reconveying the same.

We do not think this an available objection to the complaint.

This was an application to a court of equity to grant the appellee relief, and the court can grant such relief as the appellee may be entitled to, and upon such terms as the court may deem equitable ; but the complaint alleges that the appellee's ward was of unsound mind at the time she made the deed, and that the appellant George W. Peck knew she was of unsound mind, and that he fraudulently pretended to purchase the land, and fraudulently procured her to execute to him a deed for the land. Having taken a conveyance from a person whom he knew to be of unsound mind, it was his duty to restore the title to her upon demand, and it is alleged that when demand was made on said Peck to do so, he refused, and claimed the land as his own. Under the facts as



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alleged it would have been of no avail if the guardian had tendered to Peck a deed to sign reconveying the land.

After Peck refused to rescind the contract and reconvey the land when demanded, and claimed it as his own, he will not be allowed when suit is brought to defeat the action by reason of its not being alleged in the complaint that a deed was tendered to him to sign at a time when he refused to reconvey, and asserted his title to the land.

There was no error in overruling the demurrer to these two paragraphs of the complaint.

The third paragraph of the complaint sets out the fact that Mrs. Delong was adjudged of unsound mind, and the appointment of the appellee as her guardian, and seeks to rescind the contract for fraud, and it is contended that the paragraph is insufficient; that the fraudulent representations alleged are not as to material facts, and that to rescind a contract on account of fraudulent representations the representations must be of material existing facts, must be false, and must have been relied upon as an inducement to enter into the contract.

This paragraph alleges that Mrs. Delong, at the time of making the conveyance, was an old lady, near eighty years of age; that she was weak, and feeble in mind and body, which was well known to the defendant, George W. Peck, and that said Peck, for the fraudulent purpose of procuring a conveyance and possession of said real estate, falsely and fraudulently pretended to said Mrs. Delong that he was her friend, and truly sympathized with her in her loneliness and helplessness; that he, with her consent, made her house his home, and paid great attention to her; that he represented to her that he was a man of means, and was able to care for her during the balance of her natural life, and that he would care for her; that by reason of said false and fraudulent representations, which she believed to be true, he procured her thereby to convey to him said land for the pretended consideration of \$1,500, for which he gave her his ten prom-

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issory notes for \$150 each, payable respectively in 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 years, and secured the same by a mortgage on said real estate, in which mortgage it was conditioned that it could not be foreclosed until the last note became due; that the real estate was worth the sum of \$4,000.

This paragraph does not show these parties to be related, and it does show that the defendant, for the fraudulent purpose of procuring a conveyance of the land, ingratiated himself into the confidence of an old, infirm, weak-minded lady, nearly eighty years of age; that he feigned an affection for, and an interest in her welfare; that he falsely represented he was a man of means, and able to care for her during her natural life, when he was not; that he obtained the land for \$1,500, when it was worth \$4,000, and placed a condition in the mortgage whereby said sum could not be collected for ten years.

In *Robinson v. Glass*, 94 Ind. 211, the court instructed the jury that "The infirmity of age and of mind may be taken into consideration where an effort has been made to deceive, in determining whether or not the person claimed to have been deceived exercised common prudence, such as persons similarly situated would ordinarily exercise under like circumstances." This we think proper in determining whether or not the facts alleged constitute such fraud as will entitle the party to a rescission of the contract or not. It is proper to consider the circumstances under which they were made, and the condition of the parties by whom and to whom they were made; the inadequacy of the consideration to be paid for the property is proper to be considered in determining the motives of the person seeking the conveyance, and as to whether the person making the conveyance was improperly influenced. The averments in the complaint of the fraudulent acts and representations on the part of George W. Peck show a cunning, fraudulent purpose to cheat the old lady out of her farm, and that he accomplished his purpose; the further allegations show that he was about to transfer it

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into the hands of innocent purchasers, for value. *Shuee v. Shuee*, 100 Ind. 477; *Physio-Med. College of Indiana v. Wilkinson*, 108 Ind. 314.

The court's finding is based upon the other paragraphs of the complaint. The finding is that Mrs. Delong, at the time she made the conveyance, was of unsound mind, and incapable of managing her own estate, and that said George W. Peck knew that she was of unsound mind, and that he fraudulently persuaded and induced her to make the conveyance, and that the land was of the value of \$3,100. There was no available error in overruling the demurrer to the third paragraph of the complaint.

It is further contended that the finding of the court is not supported by sufficient evidence. In this we can not concur. There is evidence warranting the finding of the court.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 28, 1890.

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No. 14,157.

BERNHAMER v. DAWSON, ADMINISTRATOR.

**SUPREME COURT.**—*Weight of Evidence.*—The Supreme Court will not reverse a judgment upon the weight of the evidence.

**PRACTICE.**—*Rejection of Evidence.*—Where the court is requested to strike out the testimony of a witness, but no reason for its rejection is shown at the time the request is made, no question is presented to the Supreme Court upon a ruling of the court denying the request.

From the Marion Superior Court.

*W. F. A. Bernhamer, W. B. Walls, C. S. Denny and W. F. Elliott*, for appellant.

*S. J. Peelle and W. L. Taylor*, for appellee.

**COFFEY, J.**—This was a suit by the appellant against the appellee, as administrator of the estate of Kate Dawson, deceased, upon a promissory note executed by the said Kate

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*Bernhamer v. Dawson, Administrator.*

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Dawson to the appellant on the 21st day of November, 1885.

The appellee filed an answer consisting of six paragraphs, the first being a general denial.

The second is a plea of payment.

The third is a plea of no consideration.

The fourth is a partial failure of consideration.

The fifth avers that the note in suit was procured through fraud and misrepresentation, in this: That the said Kate Dawson had been arrested and was in jail upon a charge of adultery and incest, and that the appellant went upon her recognizance to secure her release; that before he would sign said recognizance he induced her to sign said note, by falsely and fraudulently stating to her that said note was to indemnify him against any loss he might suffer by reason of a breach, on her part, of said recognizance; that appellant made said statements to the said Kate Dawson for the fraudulent purpose of procuring her signature to said note, and that the same was not executed to secure attorney's fees as pretended by the appellant; that there was no breach of said recognizance, and the appellant did not suffer any loss on account of signing the same.

The sixth paragraph avers that the said Kate Dawson had been convicted of a misdemeanor before the mayor of the city of Indianapolis, fined and sentenced to the work-house; that she appealed from such conviction to the criminal court of Marion county, and that the appellant signed the appeal bond necessary to procure and perfect said appeal; that said note was executed by the said Kate Dawson to the appellant to indemnify him against loss on account of having signed said appeal bond; that the appellant never did suffer any loss or damage on account of said bond.

Upon issues formed the cause was tried by a jury who returned a verdict for the appellee, upon which the court rendered judgment, over a motion for a new trial.

The assignment of error calls in question the correctness of the ruling in overruling the motion for a new trial.

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Bernhamer v. Dawson, Administrator.

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The first contention of the appellant is, that the verdict of the jury is not supported by the evidence.

We have carefully read the evidence in the cause and find that there is some evidence tending to support the conclusion reached by the jury. Indeed, there is much testimony tending to prove that the appellant did not regard the note in suit as a binding obligation, and that he repeatedly stated to the deceased that he had no claim against her. Under the well known rule in this court we can not disturb the verdict of the jury on the evidence.

It is also contended by the appellant that the court erred in refusing to strike out the testimony of a witness as to what the deceased said about the consideration upon which the note in suit was executed; but no reason for striking out this testimony was, at the time, pointed out to the court. As no reason was pointed out to the court for rejecting this evidence no question upon the ruling of the court is presented for our consideration. *Farman v. Lauman*, 73 Ind. 568; *City of Delphi v. Lowery*, 74 Ind. 520; *Blizzard v. Hays*, 46 Ind. 166.

Finally, it is contended by the appellant that the court erred in its instructions to the jury, and many supposed errors in the instructions are pointed out and argued.

The instructions are somewhat lengthy and cover minutely every phase of the case, but no good purpose would be subserved by setting them out in this opinion. We have given them a critical examination, and when taken as a whole we think they state the law of the case, as made by the evidence, fairly and correctly. The court committed no error in its instructions to the jury.

There is no error in the record for which the judgment of the court below should be reversed.

Judgment affirmed.

ELLIOTT, J., took no part in the decision of this cause.

Filed May 28, 1890.

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 McWhorter et al. v. Heltzell.
 

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No. 14,374.

## MCWHORTER ET AL. v. HELTZELL.

**REAL ESTATE.—Action to Recover.—Title by Possession.**—Where a complaint to recover real estate alleges title in fee in the plaintiff, and the facts found in the special verdict show title through possession continued for the requisite period by the ancestor of the plaintiff's grantor, and heirs, the allegation of the complaint is supported, a title in fee is shown.

**SAME.—Title Traced to Common Source.**—Where title is claimed through a common grantor, it is sufficient to trace it to that source.

**SAME.—Election to Sue for Damages.—Condition Broken.**—Where one elects to sue for damages and accepts judgment, he is precluded from entering for condition broken.

From the Noble Circuit Court.

*P. V. Hoffman*, for appellants.

*H. G. Zimmerman*, for appellee.

ELLIOTT, J.—The facts as they are stated in the special verdict are, in substance, these: The land in controversy was entered by Jerome Sweet under a land warrant in 1852, but he did not take possession of it. On the 26th day of July, 1853, Harrison Wood conveyed the land by deed of general warranty to Andrew Cramner. This deed was recorded on the 7th of September of that year, but it does not appear that Wood ever had possession of the land. Cramner lived on the land, cleared and fenced part of it. He died in possession of the land, leaving as his heirs Minerva Cramner, his widow, and Joseph J. Cramner, David B. Cramner and Ananias Cramner, his children. All of the children were infants at the time of their father's death. The widow, Minerva Cramner, married John McWhorter, a brother of the defendant James McWhorter, with whom she lived until her death, in 1862. Her second husband and two of the children of the second marriage, Sarah and Adaline, survived her. On the 30th day of January, 1869, Joseph J. Cramner conveyed the one undivided third of the land to

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194	199
184	248
186	660
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Joseph Roe, who was then in possession of the land. On the 21st day of November, 1871, David B. Cramner conveyed to the appellee one undivided third of the land, but at the time of the execution of the conveyance the grantor was not in possession of the land, having, while an infant, executed a lease for life to Sylvius Roe, the wife of Joseph Roe. At the time of the execution of the deed David B. Cramner revoked and disaffirmed the lease executed by him during his infancy. On the 7th day of May, 1877, Ananias Cramner conveyed an undivided one-third of the land to the appellee. On the 7th day of December, 1871, George W. Heltzell was in possession of the land, and on that day Joseph Roe and his wife Sylvius Roe executed to Heltzell a deed for the undivided one-third of the land. At the time of the execution of the deed Heltzell executed a written agreement, wherein he agreed to deliver to Sylvius Roe one-third of all the crops grown on the land during her life. Heltzell failed to perform his agreement, and on the 8th day of December, 1873, Sylvius Roe instituted an action against him before a justice of the peace to recover the value of the portion of the crops he had agreed to deliver to her. She recovered judgment; Heltzell appealed to the circuit court, but she again succeeded. The judgment for damages recovered by her was subsequently paid. On the 17th day of August, 1874, Heltzell removed from the land, declared he would no longer cultivate it, and abandoned it. From that time until the death of Sylvius Roe he failed and refused to cultivate the land or to comply with his agreement. On the 17th day of August, 1874, George W. Heltzell executed a deed for the land to the appellee. In the deed executed by him it was recited that the grantee took the land subject to the agreement made at the time Joseph and Sylvius Roe conveyed the land to George W. Heltzell. At the time Heltzell surrendered possession of the land Sylvius Roe took possession, and continued in possession until her death in 1886. Sylvius Roe left surviving her three children, Josephus

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Roe, Rachel McWhorter and Sylvius Heltzell, the wife of George W. Heltzell.

It is argued by appellants' counsel that the trial court erred in rendering judgment on the special verdict in favor of the appellee, and the first proposition stated in support of this general position is, that as the complaint alleges that the appellee is the owner in fee, there can be no recovery unless the special verdict shows that he is the owner in fee, and that it fails to do this. We think that counsel is clearly in error. The ancestor of the appellee's grantor went into possession in 1853, and possession begun by him and continued by his heirs gave them a title in fee simple. Title acquired by possession is as high as any known to the law. *Sims v. City of Frankfort*, 79 Ind. 446; *Riggs v. Riley*, 113 Ind. 208. The right acquired by the ancestor vested in his children, and when the possession ripened into a title it became a fee. *Brown v. Freed*, 43 Ind. 253. But, independently of the rule just stated, the case is with the appellee upon the point under discussion, for Sylvius Roe claims through Joseph J. Cramner, and he through Andrew Cramner, so that all the parties claim title from a common source, and this brings the case within the familiar rule that where title is claimed through a common grantor it is sufficient to trace it to that source. *Wilson v. Peelle*, 78 Ind. 384.

So far as concerns the breach of what the appellants' counsel denominates a condition subsequent, it is enough to say that Sylvius Roe, by electing to sue for damages, and accepting judgment, precluded herself from entering for condition broken. It is a very ancient rule that a condition once gone is gone forever. *Dumpor's Case*, 1 Smith's Leading Cases, 47; 2 Washburn Real Prop. (4th ed.) 12; *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535.

Judgment affirmed.

Filed May 28, 1890.



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The Continental Insurance Company of New York City v. Kyle.

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No. 14,259.

THE CONTINENTAL INSURANCE COMPANY OF NEW YORK  
CITY v. KYLE.

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148	237

**INSURANCE.—Policy.—Condition Avoiding.**—"Vacant or Unoccupied."—The policy of insurance upon a dwelling-house was conditioned to be void if the house should become "vacant or unoccupied." The tenant moved out of the building on the 26th day of March. After her removal the parties to whom the owner had previously rented it made certain repairs on the premises, intending to move into the house on the 1st day of April. On the 30th day of March, the day the repairs were completed, the prospective tenants put some hay into the loft of a stable on the premises, and buried some potatoes on the lot near the house. The dwelling was destroyed by fire on the 31st day of March. It was unoccupied when burned, and the only articles in it were some planes left after the completion of the repairs.

**Held**, that the house was vacant within the meaning of the condition of the policy, and that the policy was void.

From the Vigo Circuit Court.

*H. H. Boudinot, W. Eggleston and E. Reed*, for appellant.

*C. F. McNutt, J. G. McNutt and F. A. McNutt*, for appellee.

**BERKSHIRE, C. J.**—This was an action brought by the appellant to review a judgment obtained by the appellee against the appellant in an action upon an insurance policy issued by the appellant to the appellee, the said judgment having been obtained in the said Vigo Circuit Court.

The complaint rests upon the first branch of section 616, R. S. 1881. The court below sustained a demurrer to the complaint, and the appellant elected to abide by the ruling upon the demurrer, and judgment having been given for the appellee, this appeal is prosecuted.

The errors of law stated in the complaint are:

1st. The court erred in its conclusions of law upon the facts found and stated in its special finding.

2d. The court erred in overruling the plaintiff's motion to modify said special finding.

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3d. The court erred in overruling the motion for a new trial.

The first alleged error involves substantially the same questions as the third, and as the third presents the questions more clearly and satisfactorily, we do not care to consider the first.

It does not become necessary to consider the second alleged error, but see *Levy v. Chittenden*, 120 Ind. 37.

The policy sued upon in the original action contained the following conditions:

“Or if the assured, without written permission hereon, shall now have or hereafter make or procure any other contract of insurance, whether valid or not, or if the above mentioned buildings *be or become vacant or unoccupied*, or be used for any other purpose than is mentioned in said application without consent endorsed hereon, or if the property shall hereafter become mortgaged or encumbered, or upon the commencement of foreclosure proceedings, or in case any change shall take place in the title or possession (except by succession by reason of the death of the assured) of the property herein named, or if the assured shall not be the sole and unconditional owner in fee of said property, or if the policy shall be assigned, or if the risk shall be increased in any manner, except by the erection of ordinary out-buildings, without consent endorsed hereon, then in each and every one of the above cases this policy shall be null and void.”

The foregoing conditions are such as the parties have a right to place in their contract, and as they form a part of the contract the courts can not disregard them. It is the duty of the courts to recognize and enforce the contracts of parties, when valid and binding, according to the terms and conditions thereof as expressed therein.

The portion of the policy which we have above set out is plain and easily understood. Policies of insurance, like all other contracts, are to be construed with reference to the in-

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tention of the parties, to be ascertained from the terms and conditions placed therein. *Barton v. Home Ins. Co.*, 42 Mo. 156 (97 Am. Dec. 329); *Straus v. Imperial Fire Ins. Co.*, 94 Mo. 182 (4 Am. St. Rep. 368); *Ripley v. Atna Ins. Co.*, 30 N. Y. 136 (86 Am. Dec. 362); *Wells, Fargo & Co., v. Pacific Ins. Co.*, 44 Cal. 397; *Home Ins. Co. v. Gwathmey*, 82 Va. 923.

With this most important rule as our guide when we read and consider the policy here under consideration, we must reach the conclusion that for a breach of any one of the conditions above named, on the part of the assured, the insurer was, because thereof, to be absolved from all liability on account of the policy, unless its consent to such breach of condition should be obtained in advance thereof.

There is no contention that the appellant by endorsement on the policy or otherwise ever gave its consent that the building insured should become or stand vacant.

This leaves but one further question for our consideration: Had the building become vacant before it was burned?

If the evidence establishes the affirmative of this proposition beyond controversy, then the court erred in overruling the motion made in the original action for a new trial, and erred in overruling the demurrer to the complaint in the present action.

In our opinion the court erred in both of its rulings. The complaint charges that the building was destroyed by fire on the 31st day of October, 1886, and the special finding states that the tenant who had occupied the building moved out on the 26th day of October, 1886, and that the fire occurred on the 31st day of the same month.

The undisputed evidence is that the tenant moved out on the 26th day of March, 1886, and that the fire occurred on the 31st day of said month.

We have concluded to set out the evidence as we find it in the bill of exceptions with reference to the occupancy of the building.

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The appellee testified : "At the time the building was insured it was occupied by myself, and afterwards by my aunt. She moved out of the house on the 26th day of March, 1886, and took everything out of it. Prior to her removal from the house I had rented it to Crabb and McClintock. After she moved out they made some repairs on the house, and when they finished repairing they left two or three planes in the house. On the 30th or 31st of March the said Crabb and McClintock hauled some hay and put it in the stable loft on the premises, and intended to move in on the 1st day of April, 1886. On the night of the 31st day of March, 1886, the house was totally destroyed by fire. At the time it burned the only articles in it were the planes left there by Crabb and McClintock after they had finished the repairing."

Mrs. Kyle testified : "I am the aunt of the plaintiff. I moved out of the house, which was burned down, for the purpose of letting the new renters in—Crabb and McClintock. There was some hay in the stable and some potatoes buried in the ground near the house by Crabb and McClintock. The house was a frame house. Crabb and McClintock lived about one and a quarter miles from the house."

John Crabb testified : "I and Mr. McClintock, prior to March 26th, 1886, rented the house belonging to Mr. Kyle, which was burned down on the 31st day of March, 1886. After we rented it Mrs. Kyle moved out, on the 26th day of March, 1886, and took all of her things out of the house. After she moved out we made some repairs on the house and intended to move into the house on the 1st day of April, 1886. We had moved some of our things on the premises. I put some hay in the stable loft. After we got done repairing we left a plane or two in the stable. They were the only property we had there at the time the house burned down. No one was living in the house when it burned down. It was unoccupied by any one."

Henry McClintock testified : "I and Mr. Crabb rented

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the house that was burned down of Mr. Kyle, the plaintiff. At the time we rented it his aunt, Margaret Kyle, was living in it. On the 26th day of March, 1886, she moved out and took all of her things out. After she moved out we made some repairs on the house, and when we finished repairing we left a few planes in said house. On or about the 30th day of March, 1886, we hauled some hay and put it in the stable loft. At the time the house burned down it was unoccupied by any one. The planes were all the property that was in it. We intended to move in the next day after the fire occurred."

We have examined the authorities to which counsel for the appellee in their brief call our attention, and other authorities which we have been able to find in the same line, but think they do not support the rulings of the court to which we have called attention.

As strong a case as we have been able to find in support of the contention of the appellee is the case of *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472. The syllabus to that case is as follows:

"A tenant moved out of an insured dwelling on Tuesday, and on Wednesday morning the owner took possession, and, with his servants, began cleaning it, and they were continuously engaged during the working hours of each day in cleaning and moving goods into the house until Friday evening, intending that the family should be fully domiciled there on Saturday, but on Friday night the house was burned. Held, that the house was not vacant."

The facts, as stated by the learned judge who delivered the opinion of the court, are as follows:

"The house had been temporarily occupied by a tenant, who removed therefrom on Tuesday. The fire occurred on the following Friday night. The plaintiff was residing in another house, on another part of the farm; and on the next morning after the tenant moved out of the house which was burned, the plaintiff took possession of it, and his employees

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cleaned the house and prepared to move in. They were constantly engaged every day in cleaning the house, and in moving in household goods until Friday evening. By that time there were carpets and bedding, and bedsteads, cans of fruit, chairs, pictures, mirror and a stove, and clothing, a table, and dishes, in the house, and the family were expecting to be there to remain, on Saturday. The farm stock was there, and the plaintiff, or his employees, were in and about the house every day from six o'clock in the morning until seven or eight o'clock in the evening. The preparation for occupying the house was continuous during all the working hours of each day." The court could very well hold, as it did from these facts, that the building was not vacant when burned.

But we hereafter cite a later case from the same court, where the facts were not so favorable to the insurance company as the case before us, in which it was held that the policy could not be enforced.

Most of the cases to which counsel call our attention (if the buildings insured were dwellings), were where there was a permanent occupancy and a temporary absence of the tenant at the time of the fire; and if mills or manufactories, where there was but a temporary suspension of business at the time of the fire.

In construing a condition in an insurance policy against vacancy or non-occupancy the courts will look to the subject-matter of the contract. *Whitney v. Black River Ins. Co.*, 72 N. Y. 117; *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 125 Ill. 131; *Georgia Home Ins. Co. v. Kinrier*, 28 Gratt. 88; *Sonneborn v. Ins. Co.*, 44 N. J. L. 220 (43 Am. Rep. 365).

The occupancy of a dwelling, of a mill, of a barn, is each essentially different in its scope and character, and the construction must have reference thereto. *Sonneborn v. Ins. Co.*, *supra*; *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513. The house covered by the policy here under consideration was a dwelling. It became entirely vacant on the 26th day

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of March, 1886, and remained so until its destruction by fire on the 31st day of March. The prospective tenants made some repairs on the building after Mrs. Kyle vacated it, but the nature and character thereof do not appear, nor the length of time they were engaged thereat. It appears that the repairs were completed about the 30th of March, and on that day the prospective occupants moved some hay to the loft of the stable on the premises, and then or before buried some potatoes on the premises, but all of the witnesses state that the building was unoccupied when burned, and had not been occupied after Mrs. Kyle moved out, and that the only things left in it at any time after her removal were a couple of carpenter's planes left there by Crabb and McClintock during the time they were making the repairs and thereafter.

The contract in all of its parts was one that the parties were competent to make, and which they had a perfect right to enter into, and hence they are bound by all of its terms and conditions.

From the time the building became vacant until its destruction the risk which the appellant had assumed was increased because of the vacancy, and it was an increase of risk which the appellant had guarded against by its contract. It would be folly to contend that the building would have been consumed notwithstanding the vacancy. Most certainly the care and vigilance that would have accompanied the occupation of the property for its protection and preservation was lessened because of the vacancy.

In the light of all of the authorities the facts which the record discloses establish beyond question that the property was "vacant or unoccupied" from the 26th of March, 1886, until it was consumed by fire on the 31st of that month.

In *Aetna Ins. Co. v. Meyers*, 63 Ind. 238, the condition in the policy and the circumstances of the case and those in the present case do not materially differ. The following is the condition in the policy in that case: "It is hereby agreed and declared to be the true intent and meaning of the parties

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hereto, that in case the above mentioned building shall, at any time ~~after~~ the making and during the continuance of this insurance become unoccupied, \* \* \* unless herein otherwise specially provided for, or hereafter agreed by the company in writing added or endorsed on this policy, then and from thenceforth, so long as the same shall be so unoccupied \* \* \* these presents shall cease and be of no force or effect."

'We copy the following from the opinion: "It appeared by the evidence that the house was occupied by tenants when it was insured; that the tenants failed to pay rent when due, and the landlord took steps to remove them. Myers, the owner, testified: 'No one lived in the house at the time of the fire. The tenants left on Friday or Saturday. The building was burned the next Tuesday. The building was used as a tenant house. It was a double tenement, usually occupied by two families. I put the tenants out because they would not pay rent. I had engaged it to S. C. Carney as soon as I could get them out and have the building repaired. A little plastering and whitewashing was all that was needed. Carney was living in my house across the street, and was to go into it for a year, as soon as I could get the tenants out and get Fred Myers to fix the house. The tenant was to move in as soon as it was repaired.' In the case at bar the house was unoccupied at the time it was burned; it had been unoccupied for about four days; some of the witnesses make the time longer; and no definite time when it was to be occupied was fixed. It was to be occupied, as soon as it should be repaired, by Fred Myers. \* \* As a matter of fact, as we have said, the house was unoccupied when it was burned. By its terms the company was not liable on the policy sued upon. The policy was a contract. What reason appears for giving it an operation by construction different from that which its terms require? It seems to us that the literal meaning expresses just what the parties intended. Here, a tenant house is insured for a year. A



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change of tenants, during the time, is not prohibited, and might naturally be expected; short intervals in which the property would be vacant might naturally occur. The contract provided that, when they did occur, the policy should not be operative during their existence."

In *Cook v. Continental Ins. Co.*, 70 Mo. 610 (35 Am. Rep. 438), the condition in the policy was "if the premises become unoccupied without the assent of the company endorsed hereon, then, and in every such case, the policy shall be void." The following is the learned judge's statement of the facts:

"About two weeks before the fire the plaintiff went to Kansas City, Missouri, to reside, and lived there until after the fire. She shipped a car-load of her furniture to the latter place, and left about \$300 worth in the house, and instructed one Barnard to sell it, except a bed-room set, and also to rent the house. Joseph Southwick was left in possession, with instructions to remain in possession and sleep in the house until he could rent it. De Laney was to rent the house. Southwick went to Kansas City three or four days before, and was there when the fire occurred. He left no one in the house, but told De Laney, with whom he left the keys, except the key of the bedroom he had slept in, to take charge of the house and rent it if he could before he returned." And following this recital of the facts, the learned judge goes on to say:

"On these facts the question arises, was the house unoccupied when it was burned? If it was, she was not entitled to recover. 'Occupation of a dwelling house is living in it.' *Paine v. Agricultural Ins. Co.*, 5 N. Y. S. C. R. (T. & C.) 619. 'A fair and reasonable construction of the language "*vacant and unoccupied*" is, that it should be without an occupant—without any person living in it.' 78 Ill. 169. Speaking of a dwelling house and barn, COLT, J., in *Ashworth v. Builders Ins. Co.*, 112 Mass. 422, observed: 'Occupancy,

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as applied to such buildings, implies an actual use of the house as a dwelling place, and such use of the barn as is ordinarily incident to a barn belonging to an occupied house, or at least something more than a use of it for mere storage. The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such an occupancy.' In *Wood Insurance*, p. 164, the above observations of COLT, J., are quoted and approved. In *Paine v. Agricultural Ins. Co.*, 5 N. Y. S. C. 619, it was said that 'Occupation' of a dwelling-house is living in it, not mere supervision over it, and while a person need not live in it every moment, there must not be a cessation of occupancy for any considerable portion of time.'" After citing other authorities, the court say: "Applying the doctrines of the above cited cases to this, it is clear that, within the meaning of the clause under consideration, the premises insured were unoccupied from the time the plaintiff went to Kansas City until the fire occurred."

*Insurance Co. v. Wells*, 42 Ohio St. 519, supports the contention of the appellant. The tenant moved out with no intention of returning, leaving behind a barrel of corn and a coal-oil can. During the night following the removal the building was destroyed by fire. The court said: "The condition that the policy should be void if the building therein mentioned be 'vacated or unoccupied' was absolute. The parties to the contract were competent to make such a stipulation." The court concludes by holding that the property was vacant and the policy void, and says that the duration of the vacancy was wholly immaterial.

In the case of *Sleeper v. N. H. F. Ins. Co.*, 56 N. H. 401, the condition in the policy was: "If the premises hereby insured become vacated by the removal of the owner or occupant, without immediate notice to the company and consent endorsed hereon, \* \* \* this policy shall be void."

In the opinion of SMITH, J., it is said: "It is apparent

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the insurers intended to guard against the increased risk which inevitably affects buildings where no one is living or carrying on any business. An unoccupied building invites a shelter to wanderers and evil-disposed persons. No one interested is present to watch or care for the property, or seasonably to extinguish the flames in case of fire; and for various reasons that might be enumerated, an unoccupied building is more exposed to destruction, to say nothing of the inducement a dishonest owner would have to turn it, if unprofitable, into money, when insured, by becoming a party to its destruction by fire. If, then, the motive is to have some one present, occupying and dwelling in the buildings, and interested to preserve the roof that shelters his family or holds his household goods, that object would plainly be defeated by holding that he and his family may depart with all their possessions, save perhaps, a few articles not needed for present use, and still the premises be considered occupied. \* \* I can not say that I have any doubt that these buildings were vacant at the time they were burned, in the sense in which that term was used in the policy."

All of the reasoning of the court has much force when applied to the facts of the case we have before us. In the same case LADD, J., said: "I think, when the occupant of a dwelling-house moves out with his family, taking part of his furniture and all the wearing apparel of the family, and makes his place of abode in another town, although he may have an intention of returning in eight or ten months, such dwelling-house, while thus deserted, must be regarded as unoccupied—that is, vacated—according to the naturally and ordinarily received import of those terms. It is the very situation against the hazards of which the defendants undertook to guard themselves, by an express stipulation and condition inserted in the contract upon which this action is founded."

In the case of *Moore v. Phoenix Ins. Co.*, 64 N. H. 140 (10 Am. St. Rep. 384), it is held that the words "vacant" and "unoccupied," when used in a policy of insurance in con-

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nection with the idea that the insurer was stipulating against an increase in the risk from the absence of persons from the premises insured, must be regarded as interchangeable and equivalent in meaning; that when no one lives in the house it is both vacant and unoccupied, though it may contain articles of furniture which the last occupant failed to remove. In the learned note to the foregoing case (10 Am St. Rep. *supra*, p. 391,) it is said: "There is strong authority in support of the rule that a fair and reasonable construction of the term 'vacant and unoccupied,' is, that the house should be without an occupant—that is, without any person living in it," citing *North American Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *American Ins. Co. v. Padfield*, 78 Ill. 167; *Phoenix Ins. Co. v. Tucker*, 92 Ill. 64; *Fitzgerald v. Connecticut Ins. Co.*, 64 Wis. 463; *Alston v. Insurance Co.*, 80 N. C. 326; *Cook v. Continental Ins. Co.*, 70 Mo. 610. And it is stated: "The same construction is given to the term 'vacant or unoccupied.'" *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162; *Stupetske v. Transatlantic Ins. Co.*, 43 Mich. 373; *Imperial Fire Ins. Co. v. Kiernan*, 83 Ky. 468; *Sonneborn v. Insurance Co.*, 44 N. J. L. 220.

As will be remembered, the words "vacant or unoccupied" are employed in the policy under consideration.

In view of these authorities, we repeat, at least in substance, what we have once before said, that we can not well imagine how it can be said that the building covered by the policy upon which the present action rests can be said not to have been vacant when the fire occurred. It was certainly without an occupant in any sense of the term.

In *Sexton v. Hawkeye Ins. Co.*, 69 Iowa, 99, it was held that the use of a building for the purpose of storing kegs, jars, etc., was not a compliance with the condition against the vacancy of the building.

In *Feshe v. Council Bluffs Ins. Co.*, 74 Iowa, 676, the insured property was a dwelling-house, occupied by a tenant, and the policy provided that it should become void if the

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building became "wholly or partially vacant or unoccupied." The tenant moved out, and five days afterward the property was burned. The owner, who lived but a half mile distant, spent a part of each intervening day in examining and cleaning the house, but did not stay there at night, and her father, who worked near, left a few tools in the house at night. It was held that the house was "vacant and unoccupied" within the meaning of the policy, and that no recovery could be had thereon.

In *Bennett v. Agricultural Ins. Co.*, 50 Conn. 420, the policy provided that it should be void "if the dwelling-house hereby insured shall cease to be occupied as such." At the time of the insurance the house was occupied by a tenant, who moved out about six o'clock on a certain evening, and the house was burned about two o'clock the next morning. It was held that the policy was void, and was not saved by the fact that the fire had actually commenced and was smouldering unobserved when the tenant moved out.

The first of the last two cited cases is in some of its facts much like the case we have under consideration, but the facts of this case support more strongly the contention of the insurer than did the facts in those cases. For a further consideration of the questions discussed we refer to the exhaustive note to *Moore v. Phoenix Ins. Co.*, *supra*.

At this point it may be well to say that we do not wish to be understood as holding that a temporary absence of the occupants of an insured dwelling, the furniture and other contents remaining undisturbed during such temporary absence, would render a policy of insurance thereon inoperative because of a condition against vacancy.

The point is made by counsel for the appellee that counsel for the appellant do not discuss in their brief the ruling of the court upon the motion for a new trial, and therefore waive it. In this contention counsel are mistaken as to the fact.

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The judgment is reversed, with costs, with direction to the court below to overrule the demurrer to the complaint, and proceed in accordance with this opinion.

Filed May 28, 1890.

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No. 15,199.

THE BOARD OF COMMISSIONERS OF KNOX COUNTY v.  
JOHNSON.

**COUNTY SUPERINTENDENT.**—*Special Bond Required by School Book Law.*—*Failure to Give Within Time Limited.*—*Rejection of Bond by County Commissioners.*—*Appeal.*—On the 3d day of June, 1889, the plaintiff was elected county superintendent of schools of Knox county. On the 20th day of June, 1889, the board of commissioners declared the office vacant, because of the failure of the plaintiff to file the special bond required by section 10 of the act of March 2d, 1889. The plaintiff presented the special bond required by statute on August 12th, 1889, but it was rejected by the board. The plaintiff appealed from the decision of the board refusing to accept the bond, to the circuit court.

*Held*, that the rejection of the bond, since it operated to bring in question the plaintiff's right to the office, which was declared vacant; was a judicial act, and that, therefore, an appeal lay. *Board, etc., v. State*, 61 Ind. 379, doubted and distinguished.

**SAME.**—*Vacancy of Office.*—*Question as to, Judicial.*—*Decision of Board of Commissioners.*—*Appeal.*—The question whether an office is or is not vacant, is intrinsically a judicial one; and where the board of commissioners assumes to declare a legislative office vacant, it assumes to exercise judicial power, and an appeal will lie from the decision.

**SAME.**—*Special Bond.*—*When Must be Filed.*—*Statute.*—Under section 10 of the act of 1889 all superintendents elected after the passage of the act must file a special bond within thirty days after their election; but superintendents elected prior to the taking effect of the statute are allowed thirty days to file such bond after the issuance of the Governor's proclamation.

**SAME.**—*Official Bond.*—*Filing of.*—*Statute, Directory.*—*Title to Office.*—*Non-Forfeiture of.*—The statutes, however, requiring official bonds to be filed within a designated time are directory, and not mandatory. Unless the

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statute makes the filing of a bond within a limited time a condition precedent to the right to the office, the failure to file it within the time prescribed will not work a forfeiture of the right to the office, nor create a vacancy; and hence the mere failure by the superintendent elected after the passage of the act, and rightfully in office, to give the additional and special bond required, did not forfeit his title to the office, and authorize the office to be declared vacant.

**SAME.—Ouster of Officer.—Judicial Power.**—The power to oust an officer rightfully in office is essentially a judicial one, except where it is exercised by the appointing power.

**SAME.—Official Bond.—Doubt as to Time of Filing.—Ouster Without Hearing.**—Where an officer is rightfully in office, and there is a fair question as to whether the time within which he is directed to file a special bond in order to entitle him to continue in office begins to run from the date of his election, or upon the happening of a future event, and he files a bond within the time designated after such event does happen, a declaration that he has vacated the office, made without a hearing, does not oust him.

From the Knox Circuit Court.

*W. A. Cullop and C. B. Kessinger, for appellant.*

*G. G. Reily, J. Wilhelm and W. F. Townsend, for appellee.*

**ELLIOTT, J.**—On the 3d day of June, 1889, the appellee was elected county superintendent of the public schools of Knox county, for the term of two years, and on the 14th day of that month he duly qualified. On the 20th day of June, 1889, the board of commissioners declared the office vacant because of the failure of the appellee to file the special bond required by section 10 of the act of March 2d, 1889. Elliott's Supp., section 1298. The board on the same day appointed William H. Pennington to the office which it had declared vacant, but he did not accept the appointment. On the 12th day of August, 1889, the appellee presented the bond required by the statute to which we have referred, but the board refused to accept it. The appellee continued to discharge the duties of the office, but his claim for compensation was rejected. In September, 1889, the board of commissioners appointed Thomas Crosson to the office, and he accepted and qualified. The appellee appealed

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from the decision of the board to the circuit court and judgment was there rendered in his favor. In the circuit court the appellant unsuccessfully moved to dismiss the appeal.

It is held by some of the courts that the refusal to accept the bond of a public officer is a ministerial act, and that approval may be coerced by mandamus. 2 Am. & Eng. Encyc. of Law, 466, h.

But there are many strongly reasoned cases which hold that the duty is a judicial and not a ministerial one. *State v. Dunnington*, 12 Md. 340; *Ex parte Harris*, 52 Ala. 87 (23 Am. R. 559); *Thompson v. Justices*, 3 Humph. 233; *Swan v. Gray*, 44 Miss. 393; *County of Bay v. Brook*, 44 Mich. 45. In the case of *Gulick v. New*, 14 Ind. 93, it was held that mandamus will lie to compel a county clerk to approve the bond of a sheriff. The decision in that case may be sustained upon the ground that the clerk was a ministerial officer, and that no appeal could be taken from his action in refusing to approve the bond. But where the officer is a judicial one, and there is a right of appeal, the question is essentially different. There is, however, a decision directly declaring that mandate will lie to compel a board of commissioners to approve the bond of a public officer or show cause for refusing to approve it. *Board, etc., v. State, ex rel.*, 61 Ind. 379. No authorities are cited in support of the conclusion asserted in that case, nor are any reasons adduced, and we very much doubt the soundness of the doctrine asserted. We can not believe that where the tribunal is a judicial one, and a right of appeal is provided, mandamus is the appropriate remedy, but we feel bound to yield to the decision upon the rule of *stare decisis*. We are not, however, inclined to extend the rule declared in that case, and we deny its application to the present, for the reason that here the rejection of the bond operated to bring in question the right to the office held by the appellee, and the appellant did declare the office vacant. These facts, as we are satisfied, clearly distinguish the case from the case to



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which we have referred, for much more than the simple approval or rejection of the bond is involved.

The question whether an office is or is not vacant is intrinsically a judicial one. *Stocking v. State*, 7 Ind. 326. In the case cited it was held that the Legislature could not, even by an express statute, create a vacancy in a constitutional office; and, certainly, if the Legislature cannot create a vacancy in a constitutional office, a board of commissioners can not by a ministerial or legislative act create a vacancy in an office created by the Legislature. If such a board assumes to declare a legislative office vacant, it assumes to exercise judicial power, and in all cases where its decisions are judicial there is a right of appeal. It is settled, beyond controversy, that where the act is a judicial one, and there is a remedy by appeal, mandamus will not lie.

There is no question before us as to the sufficiency of the sureties on the bond tendered to the appellant, for the bond was rejected upon other grounds. The ground upon which it was rejected directly involved the appellee's right to the office, and, therefore, a judicial question was presented for decision. We are, for this reason, not required to decide whether the decision of a board of commissioners in rejecting a bond can be reviewed in an action for mandate, by appeal, or otherwise.

There is no law requiring an officer who presents a bond for approval to file any claim or complaint. If he presents his bond, and it is rejected for the reasons which influenced the board in this instance, there is a judicial decision from which an appeal will lie.

The validity of the statute which controls this case was affirmed, upon full consideration, in the case of *State, ex rel., v. Haworth*, 122 Ind. 462, so that the question remaining for decision is one of construction.

The contention of the appellant is that the failure of the appellee to give bond within thirty days after his election authorized a declaration that the office was vacant, and jus-

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tified the decision refusing to approve the bond. The appellee's position upon this point is, that the execution of the bond within thirty days after the Governor issued his proclamation protected his title to the office.

As our statement of facts shows, the appellee was elected after the act of March 2d, 1889, went into force, and the question is, whether he lost his title to the office by his failure to give the special bond within thirty days after his election. If he did lose his title to the office, then he is in no situation to complain, for if he is not entitled to the office he has no cause of action.

The section of the statute which governs the case reads thus :

"It shall be the duty of the several county school superintendents of this State, within thirty days from the issuing of the proclamation by the Governor, as hereinbefore provided for, and of every county school superintendent hereafter elected, before he enters upon the discharge of his official duties, to enter into a special bond, with at least two freehold sureties of such county, payable to the State of Indiana, conditioned that they will faithfully and honestly perform all the duties required of them by this act, and account for and pay over all moneys that may come into their hands pursuant to the provisions of this act, in a penal sum which shall be equal in amount to one hundred dollars for every one thousand inhabitants of their respective counties as shown by the last census immediately preceding the giving of such bond, to be approved by the board of commissioners of their respective counties; and upon the failure of any county school superintendent to give such bond, his office shall become immediately vacant, and the board of commissioners of his county shall immediately appoint some competent and suitable person to fill such vacancy for the unexpired term of his office."

We can not agree with the appellee's counsel that the statute does not apply to superintendents elected after the law

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went into force, but who had given the general bond at the time of their election. We see no reason for attempting to change the words used in the statute, and they clearly direct that superintendents elected after its passage shall file a special bond within thirty days after their election. It is only those who were elected prior to the time the statute took effect that are allowed thirty days after the Governor issues his proclamation to file a special bond.

But it by no means results from the construction we have given the statute that the appellee lost his title to the office to which he was elected and into which he had been legally inducted. It is held by our own and other courts that statutes requiring official bonds to be filed within a designated time are directory, and not mandatory. Upon this question the authorities are harmonious. *State, etc., v. Porter*, 7 Ind. 204; *Smith v. Cronkhite*, 8 Ind. 134; *Mayor, etc., v. Geisel*, 19 Ind. 344; *Mayor, etc., v. Wright*, 19 Ind. 346; *Speake v. United States*, 9 Cranch, 28; *People v. Holley*, 12 Wend. 481; *State, ex rel., v. Churchill*, 41 Mo. 41; *State, ex rel., v. County Court*, 44 Mo. 230; *Sprowl v. Lawrence*, 33 Ala. 674; *State, ex rel., v. Ely*, 43 Ala. 568; *Kearney v. Andrews*, 2 Stock. Ch. 70; *State, ex rel., v. Falconer*, 44 Ala. 696.

This rule is carried very far, for it is held, without substantial diversity of opinion, that unless the statute makes the filing of a bond within a limited time a condition precedent to the right to the office, the failure to file it within the time prescribed will not work a forfeiture of the right to the office nor create a vacancy. In the case of *City of Chicago v. Gage*, 95 Ill. 593 (35 Am. Rep. 182), the statute provided that upon failure to file a bond within the time designated the person chosen shall "be deemed to have refused the office, and the same shall be filled by appointment," and it was held not to change the rule. In *State v. Toomer*, 7 Rich. (Law) 216, the provision of the statute was that upon the failure of the person elected to file a bond within the time limited "his office shall be deemed abso-

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lutely vacant, and shall be filled by election or appointment," and the court adjudged upon full consideration that title to the office was not lost. But we can not further quote from the adjudged cases, and we cite them without comment. *State v. Colvig*, 15 Oregon, 57; *State, ex rel., v. Peck*, 30 La. Ann. 280; *State v. Ring*, 29 Minn. 78.

Under the established rule the mere failure of the appellee to give the additional and special bond required by the act of 1889 did not, it is clear, forfeit his title to the office, for his case is much stronger than those to which we have referred. That the case of the appellee is an unusually strong one is apparent when it is brought to mind that he was actually and rightfully in office, having duly qualified as the law directs. As he was rightfully in office, and had duly qualified, his failure to execute the special bond can not by any possibility be considered as a failure to perform a condition precedent to his right to the office. The utmost that can be said is that it was his duty, if he desired to continue in office, to file the special bond required by the act of 1889.

If the appellee has lost title to the office it must be for the reason that before he filed the special bond the board of commissioners had declared the office vacant. In order to determine the effect of this declaration it is necessary to consider the facts and to give some attention to the provisions of the act. The proclamation of the Governor was not issued until more than thirty days after the election of the appellee, and until the proclamation was issued no duty could be required of the superintendent which made a bond necessary. There is, indeed, reason for the contention of the appellee's counsel that no superintendent, whether elected before or after the passage of the act, was bound to give the special bond until the Governor's proclamation was issued, for, until that was done, there was no necessity for a bond. Section 6 of the act provides that, as soon as the contract for the furnishing of books shall be entered into, the Governor shall issue his proclamation announcing such

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fact to the people of the State. While we feel compelled to yield to the explicit provisions of section 10 and hold that the direction contained in it applies to all superintendents elected after the passage of the act, we must also hold that there is a substantial and close question involved, for there is no little reason for holding that until the Governor issued his proclamation the school superintendents were not bound to proceed under the act. There was a real question as to when it was the duty of the appellee to execute a bond, and a question, too, upon which, not only laymen, but lawyers, might, in the utmost good faith, entertain opposite views.

The question comes to this: Can a person rightfully in office be ousted for the failure to give an additional and special bond within the time prescribed in a case where there is a substantial and close legal question as to when the time begins to run, without a day in court and a hearing?

It is to be remembered that the board of commissioners has no power to elect a county superintendent, nor any general power to appoint, so that the question is very different from one arising in a case where the removal is made by the appointing power. The power to oust an officer rightfully in office is essentially a judicial one, except where it is exercised by the appointing power. *State, ex rel., v. Harrison*, 113 Ind. 434; *Page v. Hardin*, 8 B. Mon. 648; *Dullam v. Willson*, 53 Mich. 392. If it is judicial, then it seems clear that the officer is entitled to a hearing. In *Williams v. Bagot*, 3 B. & C. 786, BAYLEY, J., said: "It is contrary to common justice that a party should be concluded unheard." The question was fully considered in the case of *Queen v. Archbishop, etc.*, 1 El. & El. 545, and it was held that there could not be a removal without a hearing. This decision was made upon a statute providing that a curate whose license was revoked might "appeal to the archbishop of the province, who shall confirm or annul such revocation as shall seem to him proper." Lord Campbell said: "No doubt the archbishop acted most conscientiously, and with a sin-

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The Board of Commissioners of Knox County v. Johnson.

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cere desire to promote the interests of the church; but we all think he has taken an erroneous view of the law. He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice, that no man should be condemned without being heard." Delivering an opinion in a case involving the right to remove an officer, Chief Justice MARSHALL said: "It is a principle of natural justice, which courts are never at liberty to dispense with, unless under the mandate of positive law, that no person shall be condemned unheard, or without an opportunity of being heard." *Meade v. Deputy Marshal*, 1 Brock. 324.

In the case of *Commonwealth, ex rel., v. Slifer*, 25 Penn. St. 23, the doctrine was carried very far, perhaps too far, for it was there held that although the Governor had the power to appoint, still he could not remove an officer without giving him an opportunity to be heard. In the case of *Biggs v. McBride*, 17 Ore. 640, the question arose in a case where the Governor, acting under a statute, removed a railroad commissioner who held his office by virtue of a legislative enactment, and the court, in discussing the question whether the power to remove was executive or judicial, said: "But it is believed, under either view, and by whomsoever the power of removal for cause may be exercised, it must be done upon notice to the delinquent of the particular charges against him, and an opportunity be given him to be heard in his defence." Many other cases affirm the same general doctrine. *State, ex rel., v. Hawkins*, 44 Ohio St. 98; *People, ex rel., v. Board of Fire Comm'rs*, 72 N. Y. 445; *People, ex rel., v. Mayor*, 19 Hun, 441; *State, ex rel., v. City of St. Louis*, 90 Mo. 19; *Willard's Appeal*, 4 R. I. 595; *Field v. Commonwealth*, 32 Pa. St. 478; *Foster v. Kansas, ex rel.*, 112 U. S. 201; *Kennard v. Louisiana, ex rel.*, 92 U. S. 480. In the two cases last cited, the Supreme Court of the United States assumed jurisdiction, without hesitation or question, of cases involving the right to remove State officers, and examined the statutes and proceedings so far as to ascertain whether there was due process

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*McClure v. The Board of Commissioners of Franklin County.*

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of law under the fourteenth amendment; thus tacitly deciding that without a hearing an officer can not be removed.

Our conclusion is that where, as here, an officer is rightfully in office, and there is a fair question as to whether the time within which he is directed to file a special bond in order to entitle him to continue in office, begins to run from the date of his election, or upon the happening of a future event, and he does file a bond within the time designated after such event does happen, a declaration that he has vacated the office made without a hearing does not oust him. We are far within the authorities in asserting this conclusion, but the case does not require that a broader or more general one should be asserted.

As the appellee had been duly elected and inducted into office, and as the only question that was presented by his failure to file the additional bond required by the act of 1889 was as to his right to continue in office, it was not necessary for him to show that he was eligible to the office. There is a radical difference between such a case as this and one wherein the plaintiff asserts a right to be admitted to an office.

Judgment affirmed.

Filed April 25, 1890; petition for a rehearing overruled May 28, 1890.

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No. 14,961.

**MCCLURE v. THE BOARD OF COMMISSIONERS OF FRANKLIN  
COUNTY.**

**TURNPIKE.**—*Construction of Instead of Bridge.*—*County Commissioners.*—*Petition not Required.*—*Statute.*—Under the act of March 7th, 1885, authorizing the board of commissioners to order the construction of a free turnpike road instead of a bridge, if in their opinion the pike can be so constructed as to avoid the necessity of a bridge, and be of the same public convenience, no petition is required. The board may proceed on its own motion.

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McClure v. The Board of Commissioners of Franklin County.

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**SAME.**—*Location of New Road.*—Under the act the board, where there is no established highway over the route of the proposed road, may order a new road to be laid out.

From the Franklin Circuit Court.

*J. F. McKee, D. W. McKee, F. Berry and H. Berry, Jr.,*  
for appellant.

*F. M. Alexander and G. F. O'Byrne,* for appellee.

OLDS, J.—The board of commissioners of Franklin county, at its June session, 1887, made an order for the construction of a free turnpike in said county. The order recites that: "Whereas, in the opinion of the board of commissioners, public convenience requires that a bridge should be built over the east fork of the White Water river, in Franklin county, Indiana, at a point near the southwest corner of the southeast quarter of section 4, township 9, of range 2 west; and, whereas, in the opinion of said board, a free turnpike, less than three and one-half miles in length, can be constructed so as to avoid the necessity of such bridge and be of the same public convenience; and, whereas, from surveys and estimates heretofore made by Thomas A. Hardman, a competent surveyor and engineer heretofore appointed by the board to make estimates of the cost of such bridge and free turnpike, the board finds that the cost of building a suitable bridge at said point would be thirteen thousand dollars, and that the cost of constructing a free turnpike, to avoid the necessity of building such bridge, will be seven thousand four hundred and sixty dollars, and that the estimated cost to build the same far exceeds the ability of the road district in which said free turnpike is to be built by the application of the ordinary road work and tax to perform the same. And the board further finds that such turnpike can be so constructed as to avoid the necessity of such bridge and be of the same public convenience, and that the cost of constructing such free turnpike will be less than the cost of constructing said bridge. It is, therefore, ordered



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by the board that there be constructed, instead of a bridge, a free turnpike along the east side of the east fork of the White Water river, commencing on the east approach to the bridge," etc., describing the turnpike.

By said order the board appointed three disinterested freeholders, residents of said county, viewers, and Calvin Carter, a competent surveyor and engineer, to examine, view and lay out said road between the points described in the order, as in their opinion public convenience required, fixing a time for them to meet and take an oath, and provided that they should take to their assistance two suitable persons as chain carriers and markers, and proceed to examine, view and lay out said road, and to assess and determine the damages sustained by any person through whose land said road is to be laid out as provided by the law regulating the construction of free turnpikes, and make their report to the board and file the same with the county auditor on or before August 1st, 1887.

The viewers proceeded to discharge the duty, and view and lay out said road, and assess the damages and file their report in accordance with said order of the board of commissioners, in which the road is particularly described, giving the route, course and distance, the grade, material and manner of construction, and describing the land through which it runs, and the owners' names thereof, and amount of damage sustained, and the auditor gave notice thereof as required by section 4 of the act of April 8th, 1885, concerning gravel and macadamized roads.

At the succeeding term of the board of commissioners the appellant entered a special appearance and moved to dismiss the proceedings, the grounds of the motion being in effect that the board had no jurisdiction of the subject-matter or the person of the appellant, for the reason that no petition or bond had been filed for such free turnpike, and there had been no compliance with the statute authorizing the construction of free turnpike roads. Sections 5091-5114, R. S. 1881.

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The motion was overruled, and afterwards the appellant filed an affidavit and bond, and took an appeal to the circuit court, and then renewed his motion to dismiss, which was overruled, and exceptions reserved, and this ruling is assigned as error.

By the act approved March 7th, 1885, (Elliott's Supp., sections 1518 to 1522) the board of commissioners is authorized to construct a free turnpike instead of a bridge, if in the opinion of the board said pike can be so constructed as to avoid the necessity of such bridge, and be of the same public convenience.

The board in this case proceeded under the act approved March 7th, 1885, and the record shows a full compliance with said act. When the board proceeds under said act no petition is required; the board proceeds upon its own motion.

There was no error in overruling the appellant's motion to dismiss.

After appellant's motion to dismiss was overruled he filed an answer in two paragraphs.

The board filed a demurrer to the first paragraph, which was sustained, and appellant excepted, and this ruling is assigned as error.

This paragraph of answer is almost identical with the motion to dismiss, and proceeds upon the theory that the proceedings are under the free turnpike law, R. S. 1881, and that to give the board jurisdiction to order the construction of such road there must be a petition signed by the required number of freeholders, and notice given of the filing of such petition; and the answer sets up the fact that no such petition was filed, and that no notice was given. These proceedings are not instituted under such law, but, as we have said, the proceedings were instituted under the act of 1885, authorizing the board of commissioners, on its own motion, to order the construction of a free turnpike instead of a bridge. It is true that section 3 of the act provides that "said commissioners, in the construction of such pike, shall

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*McClure v. The Board of Commissioners of Franklin County.*

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be governed by the law regulating the construction of free turnpikes, except that the same shall be paid for as hereinbefore provided ;" and section 2 provides that it shall be paid for out of the county treasury. But the board of commissioners in this case complied with the free turnpike law in all that was contemplated in its appointment of viewers and engineers to locate the road and assess the damages ; and the land owner affected by its construction would no doubt have the right to remonstrate and have his damages assessed, if any have been sustained, under the provisions of the free turnpike law ; but the appellant does not seek that remedy in this case.

The answer also alleges that there was no established highway over the roads where the turnpike was ordered constructed, but that such order laid out and located a new road, and it is contended that the statute only contemplates the construction of a free turnpike over the route of an existing road. We do not agree with this theory. The statute (Elliott's Supp., section 1518) grants the power to the board of commissioners to construct a free turnpike instead of a bridge, and section 1520 provides that the construction shall be governed by the law requiring the construction of free turnpikes ; and section 1 of the law regulating the construction of free turnpikes, section 5091, R. S. 1881, provides that "The board of commissioners of any county in this State shall have power, as hereinafter provided, to lay out, construct, or improve, by straightening, grading, draining, paving, gravelling," etc.; and section 3 of said act authorizes the viewers appointed to view, examine, lay out, or straighten. The act of 1885 dispenses with any petition, and provides that the work shall be paid for out of the county treasury, and authorizes the board of commissioners to take the initiatory step when, in its discretion, the public convenience shall require it to be done. The board has power to order a bridge constructed, and this act gives the board the same power to construct a free turnpike instead of a bridge, if, in its

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opinion, it will take the place of, and be of the same public convenience.

The demurrer to the first paragraph of answer was properly sustained.

There was a trial had, resulting in a finding and judgment in favor of appellees. Appellant filed a motion for a new trial, which was overruled, and exceptions reserved, and this ruling is assigned as error. But no new or different question is presented by this ruling from those already passed upon.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 29, 1890.

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No. 15,602.

**PENDERGAST v. YANDES, RECEIVER.**

**CORPORATION. — Preferred Claim for Wages. — Statute. — Laborer Within Meaning of.**—The plaintiff was employed by the Broad Ripple Natural Gas Company to superintend the construction of its pipe lines. As superintendent he had full supervision of the digging of gas trenches, the laying of gas pipes, etc., with full authority to hire and discharge employees. The superintendency of the employees required considerable walking along the pipe lines, also, the testing of the wells made necessary the handling of wrenches and other tools for short periods of time, but aside from this he did no other physical or manual labor than was incident to his superintendency of the employees engaged in such work, and such as he at times did voluntarily. The company became insolvent, and a receiver was appointed.

**Held,** that the plaintiff was a laborer, within the meaning of the statute (Elliott's Supp., section 1605), and was entitled to have his claim for wages declared a preferred claim, to be paid before a distribution of the assets among the general creditors.

From the Marion Superior Court.

*J. L. McMaster* and *A. Boice*, for appellant.

*J. S. Duncan* and *C. W. Smith*, for appellee.

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Pendergast v. Yandes, Receiver.

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**COFFEY, J.**—The appellee was duly appointed and qualified as receiver of the Broad Ripple Natural Gas Company, a corporation organized for the purpose of supplying consumers with natural gas.

After his appointment the appellant filed the claim now in dispute, and sought to have the same allowed and paid as a preferred claim. The cause was tried by the court, which made a special finding of the facts in the cause and stated its conclusions of law thereon.

It appears from this special finding that the Broad Ripple Natural Gas Company is a corporation organized under the laws of this State for the purpose of supplying to consumers natural gas.

On the 19th day of March, 1888, it employed the appellant as superintendent, for the purpose of superintending the construction of its pipe lines in the city of Indianapolis and Marion county, and he continued to be so employed for one year. As such superintendent he had full supervision of the digging of gas trenches, the laying of the gas pipes, the testing of gas wells, and connecting them with the pipe lines, with authority to hire as many employees as he chose, and to discharge them at his pleasure, and had full control over said employees, who at times numbered from one hundred and fifty to two hundred. He was himself responsible directly to the company, and had no immediate superior officer except the president and vice-president. His duty was almost wholly confined to superintending the employees under his control, and in the discharge of which duty he was required to do a great deal of walking along the pipe lines, and when testing gas wells it was necessary for him to handle wrenches and other tools for a few minutes; but beyond this the discharge of his duties did not make it necessary for him to do any physical or manual labor other than such as is ordinarily incident to the superintendency of the employees engaged in such work, although he did occasionally, of his own volition, when work was pressing and there

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Pendergast v. Yandes, Receiver.

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was scarcity of hands, do some physical labor in the handling of gas pipes, and other work incident to the laying and fitting of them.

His salary or compensation was one hundred dollars per month.

His duties kept him constantly with the men who were engaged in the manual labor of laying the pipes and doing the other work herein specified, to see that such work was done properly and with proper mechanical skill; and as these men were often separated into different gangs, it was necessary for him to travel back and forth from one gang to another.

There is nothing in the articles of association or by-laws of said company specifying such an officer as that of superintendent.

The receiver was appointed on the 18th day of April, 1889. The company is insolvent, and its assets are not sufficient to pay the claims against it in full.

There is now due the appellant for services performed by him as such superintendent the sum of fifty dollars, all of which accrued within sixty days prior to the appointment of the receiver.

Upon these facts the court rendered a judgment in favor of the appellant for the sum of fifty dollars, but refused to declare it a preferred claim.

Section 1605, Elliott's Supp., is as follows: "Hereafter, when the property of any company, corporation, firm or person, engaged in any manufacturing, mechanical, agricultural or other business or employment, or in the construction of any work or building, shall be seized upon any mesne or final process of any court of this State, or where their business shall be suspended by the action of creditors or put into the hands of any assignee, receiver or trustee, then in all such cases the debts owing to laborers or employees, which have accrued by reason of their labor or

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employment to an amount not exceeding fifty dollars to each employee, for work and labor performed within six months next preceding the seizure of such property, shall be considered and treated as preferred debts and such laborers or employees shall be preferred creditors and shall be first paid in full, and if there be not sufficient to pay them in full, then the same shall be paid to them *pro rata*, after paying costs."

The sole question presented for our consideration and decision is the one involving the construction of this statute. It is contended by the appellant that his claim falls within the letter as well as the spirit of the statute, while on the other hand it is contended by the appellee that the statute was intended to cover and secure such employees only as perform physical or manual labor.

The argument of the appellee is that the word "or" is used as a disjunctive conjunction, and the words between which it stands being simply used as synonymous and both expressing the same idea, the word "employee" is altogether synonymous with the word "laborer." It is contended on the other hand by the appellant that the words "laborer" and "employee" are not used in this statute as synonymous terms, but that the word "employee" was intended to have and should receive a much broader interpretation than the word "laborer."

In view of the conclusion we have reached in this case, we deem it unnecessary to inquire whether the words "laborer" and "employee," as used in this statute, are to be regarded as synonymous or otherwise, as in our opinion, under the facts found by the court, the appellant was a laborer within the meaning of the statute.

In the case of *Conlee Lumber Co. v. Ripon Lumber, etc., Co.*, 66 Wis. 481, it was held, however, that the words "laborer" and "employee," as used in a statute similar to the one now under consideration, were not synonymous.

There is much confusion and some apparent conflict in

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the authorities upon the subject now under consideration. As to how this confusion and conflict arose it would, perhaps, be unprofitable to inquire in this case, as the authorities all agree that statutes of this kind are to be liberally construed.

In the case of *Capron v. Strout*, 11 Nev. 304, Stewart was employed as foreman of a mine at eight dollars per day, payable monthly. His duties were to act as general foreman, to "boss" the men who were at work in the mine, keep their time, and give them orders for their pay at the end of each month. He sought to enforce his claim for wages as a lien against the mining property. In answer to the argument that he was not a laborer within the meaning of the law, the court said: "It is said that he performed no work or labor in or upon the mine, and it is argued that the intention of the law was to secure those only who performed labor upon the mine with their hands; that to give it a wider construction, one that will make it include the wages of a foreman like Stewart, will make it cover the case of general superintendent and other officers of a corporation, and thereby impair the remedy of those who are the special objects of the legislative care. We do not admit that no distinction could be made in this respect between a foreman of miners and the superintendent of a company, but whether there could or not, we have no doubt that respondent's claim comes within the spirit as well as the letter of the law. According to the findings he certainly did work in the mine, though not with his hands, and it is clear that the direct tendency of his work was to develop the property. We think the foreman of work in the mine is as fully secured by the law as the miners who work under his direction."

In the case of *Stryker v. Cassidy*, 76 N. Y. 50, the claimant was an architect. He sought to enforce a statutory lien for his labor as such architect, and the court, in commenting upon his right to such lien, said: "The architect who superintends the construction of a building performs labor as



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truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. It is not any the less labor within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance. The language quoted makes no distinction between skilled and unskilled labor, or between mere manual labor and the labor of one who supervises, directs, and applies the labor of others."

The case of *Mining Co. v. Cullins*, 104 U. S. 176, is strongly in point here.

In that case the claimant was employed for an indefinite time to direct the work in the mine, with authority to employ and discharge miners, and procure and purchase supplies for working the mine. It was his duty to oversee and direct the work in said mine, direct the shipping of ore, and generally to control and direct the actual working and development of the mine. Under a statute giving a lien for work and labor, he sought to enforce a lien for his wages. The court, in answer to the claim that he was not a laborer within the meaning of the statute, said: "Statutes giving liens to laborers and mechanics for their work and labor are to be liberally construed. The finding of the district court makes clear the character of the services rendered by the defendant in error. He was not the general agent of the mining business of the plaintiff in error. \* \* \* He was not a contractor. His services were not of a professional character, such as those of a mining engineer. He was the overseer and foreman of the body of miners who performed the manual labor upon the mine. He planned and personally superintended and directed the work, with a view to develop the mine and make it a successful venture. \* \* \* Such duties are very different from those which belong to the general superintendent of a railroad, or the contractor for erecting a house. Their performance may well be called work and labor; they require the personal attention and supervision of the foreman, and occasionally in an

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emergency, or for an example, it becomes necessary for him to assist with his own hands. They can not be performed without much physical exertion, which, while not so severe as that demanded of the workman under his control is nevertheless as really work and labor. Bodily toil, as well as some skill and knowledge in directing the work, is required for their successful performance. We think that the discharge of them may well be called work and labor, and that the district court rightfully declared the person who performed them entitled to a lien under the law of the Territory." See, also, *Mulligan v. Mulligan*, 18 La. Ann. 20; *Knight v. Norris*, 13 Minn. 473; *Caraker v. Mathews*, 25 Ga. 571; *Gurney v. Atlantic, etc., R. W. Co.*, 58 N. Y. 358; *Bass v. Doerman*, 112 Ind. 390.

In the case last cited it was held by this court that the statute now under consideration should receive a liberal construction.

While the appellant in this case was called superintendent, it is shown that he was not an officer of the company, nor was he general manager or a general agent. His principal duties were to superintend the construction of trenches and the laying of gas pipes. Within the authorities above cited, he was to all intents and purposes a laborer. Under the liberal construction to be given to the statute before us he was a laborer within that term as used in the statute, and his claim for wages should be declared a preferred claim, and paid before a distribution of the assets among the general creditors.

It follows that the Marion Superior Court erred in refusing to declare the claim in controversy preferred, for which reason the judgment must be reversed in so far as it adjudges said claim to be paid as a general debt.

The judgment of the Marion Superior Court, in so far as it adjudges the claim in suit to be a general debt, to be paid out of the assets in the hands of the receiver, is reversed,

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with directions to enter the proper order declaring the same a preferred claim.

Filed May 29, 1890.

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 No. 14,215.

### MILLER, EXECUTOR, v. SHIELDS.

**MARRIED WOMAN. — Suretyship. — Burden of Proof.** — Where a married woman is sued upon her individual note, which is secured by a mortgage on her separate real estate, her husband joining, the burden is upon her to show her suretyship, since it will not be presumed that she occupies the relation of surety, or guarantor, but that fact must be established by affirmative evidence.

From the Jackson Circuit Court.

*J. F. Applewhite* and *R. Applewhite*, for appellant.

*B. H. Burrell*, for appellee.

**BERKSHIRE, C. J.**—This action is bottomed on a promissory note executed by the appellee to the appellant's testator. The appellee answered in three paragraphs:

*First.* The general denial.

*Second.* Want of consideration.

*Third.* Coverture and suretyship.

The appellant replied in general denial.

The cause was submitted to the court for trial, and after the evidence had been concluded a finding was returned in favor of the appellee.

The appellant filed a motion for a new trial, which was overruled by the court and an exception saved, and judgment rendered for the appellee.

The record presents but one question for our consideration: Is the finding of the court sustained by sufficient evidence?

Notwithstanding the well established rule of this court

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that it will not disturb the judgment of a trial court because the evidence which supports it is weak and unsatisfactory, we are compelled to reverse the judgment here involved for the reason that there was a failure of proof as to one vital fact.

In Indiana, since the year 1881, the disabilities which the common law imposed upon married women as to the making of contracts, with certain limitations, have been removed. Sections 5115, *et seq.*, R. S. 1881.

As this court has frequently announced, ability, and not disability, is the rule as to the capacity of married women to enter into contracts. *Vogel v. Leichner*, 102 Ind. 55. In this case it is said: "By the more comprehensive enactment of 1881, above referred to, the Legislature abrogated all the legal disabilities of married women except such as are expressly saved in the act."

In *Rosa v. Prather*, 103 Ind. 191, it is said: "The three most notable respects in which the disability of coverture was felt at common law were, in the inability of the wife to sue, in her inability to enter into a contract, and in her inability to control her own property. These separate disabilities have all been, in general terms, removed. \* \* \* The disabilities upon these and other subjects which still remain are special and exceptional, and no longer constitute a part of a category of general disabilities." In *Arnold v. Engleman*, 103 Ind. 512, it is said: "The question here is as to the sufficiency of the facts pleaded to avoid the disability of coverture. We have decided that in cases of married women ability is now the rule and disability the exception. This is the only reasonable interpretation of our statute, for its language is broad and comprehensive. Section 5115 provides that 'All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided.' This confers a general power to make executory contracts except such as are prohibited by the statute. There is no provision prohibiting married

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women from purchasing wearing apparel and executing notes for its value. It is true, that in section 5117 it is provided that she may make contracts concerning her separate personal property, but this is merely permissive and cumulative, and is not a limitation upon the general power conferred by the section quoted. It would be a great stretch to affirm that in buying personal property she was not contracting concerning it, and if the provision found in section 5117 stood alone it would be quite doubtful whether a married woman's contract for the purchase of wearing apparel for herself were not valid, but the provision of section 5115 makes it very clear that such contracts are valid and enforceable. Our conclusion is that a married woman may purchase wearing apparel for herself, and that notes executed by her for the price which she agreed to pay for it, are valid and may be enforced." See *Barnett v. Harshbarger*, 105 Ind. 410. In *McLead v. Aetna L. Ins. Co.*, 107 Ind. 394, this court said: "The notes and mortgage were jointly executed by the appellant on the 18th day of November, 1882, at which time the act of April 16th, 1881, concerning husband and wife, which took effect on September 19th, 1881, was a part of the law of this State." Section 5115 of said statute is then set out, and the court go on to say: "In *Arnold v. Engleman*, 103 Ind. 512, after quoting section 5115 as above, the court said: 'This confers a general power to make executory contracts except such as are prohibited by the statute.' In section 5117, R. S. 1881, it is provided that a married woman 'shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same unless her husband join in such contract, conveyance, or mortgage.' Section 5119, R. S. 1881, reads as follows: 'A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner; and such contract, as to her, shall be void.'" See *Lane v. Schlemmer*, 114 Ind. 296 (bottom of page 301).

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In *Phelps v. Smith*, 116 Ind. 387 (402), it is said: "The decision in *Phipps v. Sedgwick*, 95 U. S. 3, if conceded to be otherwise relevant, is not in point, because the court placed its judgment upon the disability created by coverture, saying that 'such a proposition would be a very unjust one to the wife still under the dominion, control, and personal influence of her husband.' Manifestly this rule can not apply in jurisdictions where a married woman possesses nearly all of the rights of a *feme sole*, and where ability is the rule and disability the exception."

In the quotation which we have made from *Arnold v. Engleman*, *supra*, said section 5115 is set out, and we need not copy it again.

The exception involved in the case now under consideration is found in section 5119, which section appears in the quotation from *McLead v. Aetna L. Ins. Co.*, *supra*, and need not be again quoted.

It is a general rule of pleading, applicable alike to civil actions and criminal prosecutions, that where an exception or proviso is embodied in the enacting clause of a statute, or in a contract, it must be negatived in the complaint, or indictment; but if it is found in a subsequent distinct clause or section of the statute, or covenant, as is the case with the statute before us, then there need be no negation. Gould Plead. pp. 514, 515; Stephen Plead. (Heard), pp. 443, 444.

In *Commonwealth v. Jennings*, 121 Mass. 47, GRAY, C. J., speaking for the court, said: "On the other hand, it appears to us to be established, by a great preponderance of authority, that when an exception is not stated in the enacting clause otherwise than by merely referring to other provisions of the statute, it need not be negatived, unless necessary to a complete definition of the offence."

In *Hart v. Cleis*, 8 Johns. 41, the court said: "The action below was brought for a penalty incurred under the 6th section of the act concerning slaves and servants. The special

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causes of demurrer stated upon the record, are not material; but the defendant relies upon what he alleges to be defects, in substance, in the declaration, viz. that the plaintiff does not negative the excepted cases in the section, and that he does not aver that the defendant was master of the slave, or acted with his privity. It is a sufficient answer to the first objection, that the exception forms no part of the plaintiff's title or right of action, but is merely matter of excuse for the defendant. The excepted cases are not incorporated into the body and substance of the enacting clause; but are given as exceptions, and the instances are not specified in that, but in the subsequent sections." See *Commonwealth v. Tuttle*, 12 Cush. 502; *Commonwealth v. Hill*, 5 Gratt. 682; *State v. Miller*, 24 Conn. 522; *United States v. Cook*, 17 Wall. 168; *State v. Abbey*, 29 Vt. 60; *Fleming v. People*, 27 N. Y. 329; *Harris v. White*, 81 N. Y. 532. Our own cases are to the same effect. *Russell v. State*, 50 Ind. 174; *State v. Maddox*, 74 Ind. 105; *Mergentheim v. State*, 107 Ind. 567.

The action in this case was upon a promissory note executed by the appellee alone.

The complaint did not allege that the appellee was under coverture, but had the fact appeared therein we think it would have been good in the absence of an allegation in negation of section 5119, *supra*. We think so in view of the rule as supported by the authorities cited above.

The precise question has never been before this court. It was held in the case of *Vogel v. Leichner*, *supra*, that when the husband and wife jointly executed a promissory note and a mortgage upon the separate real estate of the wife, the burden of proof was on the plaintiff seeking to foreclose the mortgage to show that she was liable.

The foregoing case was followed in the case of *Cupp v. Campbell*, 103 Ind. 213.

In that class of cases the presumption which naturally arises because of the peculiar relation that exists as between husband and wife, is that he is the principal debtor, and she

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but his surety, and hence it was well ruled in those cases that the obligation could not be enforced against her, nor against her property specifically pledged for its payment, it not appearing affirmatively that she was a principal debtor. But when a married woman, as she has full power to do under the married women's act, executes her individual note, whereby she promises to pay a given sum of money, the question is very different. No presumption such as that announced in the cases above can prevail.

To hold that when a married woman executes her individual promissory note she is presumed to stand as surety for her husband or some other person until the contrary is made to appear, would be to carry the doctrine of presumptions beyond the border line.

It is quite difficult to imagine the relation of principal and surety without a principal, and equally so to find a substantial reason on which to rest the presumption that whenever a married woman executes her individual promissory note she occupies the position of a surety for her husband or some other person. It is true that it may be shown that the individual note of a married woman was given solely for the benefit of the husband or some one else, but when this is claimed by her it must be made to appear affirmatively.

The following cases, we think, support our conclusion: *Arnold v. Engleman*, *supra*, was an action on a promissory note executed by a married woman alone, and included an account for merchandise sold and delivered to her. And at this point, we feel that it is not improper to quote for the second time a small portion of what was said by the court in that case: "It would be a great stretch to affirm that in buying personal property she was not contracting concerning it." But it would not be more so than to presume when a married woman executes her separate promissory note, reciting that for value received she promises to pay so many dollars, that the consideration has moved to some one else and that she has received no benefit therefrom. In *Mc-*



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*Lead v. Aetna L. Ins. Co.*, *supra*, at page 396, the court said: "Except as prohibited in these two sections, 5117 and 5119, a married woman had and has the same power to make executory contracts, and was and is as *much bound thereby*, as if she had been or was unmarried at the time of their execution. If the appellee's complaint, in the case in hand, had shown that the appellant Malinda was the surety of her co-appellant in the notes in suit, or that the mortgaged real estate was her separate estate, it would have been necessary, perhaps, to have alleged the further fact, in order to state a cause of action against her, that she had received either in person or in benefit to her estate the consideration of such notes and mortgage, or some part thereof. But as no such showing was made in the complaint it was sufficient to withstand appellant's assignment of errors, and would have been good, we think, even upon demurrer for the alleged want of facts." In *Bennett v. Mattingly*, 110 Ind. 197, at page 199, NIBLACK, J., for the court, said: "An argument is submitted against the sufficiency of the complaint upon demurrer, upon the ground that it showed Mrs. Dingman to have been a married woman at the time she executed the notes and mortgage, and did not aver a state of facts creating a liability on her part, notwithstanding the disabilities imposed by her coverture. This would, at one time, have been a valid objection to the complaint, but the law in that respect has been materially changed by the Revised Statutes of 1881. Coverture is no longer a legal disability in this State, except in some special cases, and, hence, upon the facts averred, *no disability on the part of Mrs. Dingman could have been fairly presumed*. The complaint was, consequently, sufficient upon demurrer."

In view of these authorities no such presumption can arise as that contended for by the appellee. But *Elliott v. Gregory*, 115 Ind. 98, is still a much stronger case against the said contention. There a married woman was sued for medical services rendered to her at her special instance

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and request and upon her express promise to pay for the same. She answered coverture, averring in addition that the debt was her husband's, for the reason that she could not enter into a binding contract for such services.

The answer was demurred to, the cause of demurrer being want of facts, which was overruled; this court reversed the ruling of the trial court, and said: "It was an answer in confession and in avoidance. It impliedly admitted the rendition of the services sued for, and Mrs. Gregory's promise to pay for the same, and then set up her coverture as a protection against her liability to pay for such services. These made the pleading a formal, as well as a substantial, answer of coverture to the action. This, under existing statutes and our decisions upon them, was not a good defence to the complaint." Section 5115, *supra*, is then quoted, and the court go on to say: "In the construction of this section we have held that a married woman's ability to contract is now the rule, and that her disability to do so constitutes the exception. The answer under consideration did not base Mrs. Gregory's defence upon any of the exceptional disabilities still imposed on married women. On the contrary, the allegations of the complaint, which were impliedly admitted by the answer, made a case affirmatively in which coverture was no disability." That case seems to cover the case at bar.

Here the gravamen of the action, as we have already said, is a promissory note, and at this point we desire to set the note out:

"\$500.

BROWNSTOWN, January 25th, 1883.

"One year after date I promise to pay to the order of Henry G. Smith five hundred dollars, for value received, without any relief whatever from valuation or appraisement laws, with eight per cent. interest from date until paid, and attorney's fees.

ISABELLA SHIELDS."

In the case at bar, as in the case last cited, the promise is the express and individual promise of a married woman, and

differs only in the fact that in the former case the promise rested in parol, while in the present case it is in writing.

In the former case the character of the consideration upon which the promise rested is stated, as was necessary, because of the fact that the promise rested in parol ; but in the case at bar the action is bottomed upon a written obligation, which implies a consideration.

Who is presumed to have received the consideration? Necessarily the party who executed the instrument. The question of consideration can only be of consequence to the parties to the obligation. Whether others were, or were not, benefited because of the giving of the obligation is wholly unimportant, because in no event can it be enforced against them. But the obligation here sued upon, upon its face expressly states that the note was given for value received. Value received by whom? The note itself states, "I promise to pay," etc., "for value received;" value received by the promisor.

But suppose in the last cited case the answer had been good, and at the point where it failed the proof had failed, the result must necessarily have been the same. Why the same? Because in an action upon the separate and express promise of a married woman, where a valuable consideration appears, the burden is upon her to show that she is not liable. And we think it can make no difference whether the consideration is affirmatively shown, or arises by implication ; but the principle here involved has been further settled by this court against the contention of the appellee.

In *Security Co. v. Arbuckle*, 119 Ind. 69, Matthew and Mary E. Arbuckle, husband and wife, owned by entireties certain real estate ; they executed their joint notes and a mortgage upon the said real estate to secure the same ; the application for the loan for which the note and mortgage were executed, was executed by them jointly. The mortgagee drew his check for the money loaned to them jointly, but delivered it to Matthew Arbuckle, the husband, and he

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drew the money. The special finding of the court failed to show for what purpose the money was borrowed or how used. The court said: "The mortgaged estate being the joint property of both, and the loan having been made on the joint application of both mortgagors, the burden is upon them to make it appear that the consideration of the notes was not obtained and used for the benefit of the joint estate. This is not the case of a married woman mortgaging her separate estate to secure a debt *which appears to be the obligation of herself and another*. This is the case of the owners of a joint estate who joined in a mortgage thereon *to secure the apparent obligation of both*, and it must affirmatively appear that the debt was not for their joint benefit." The reasoning in that case meets the question before us.

This is not the case of a married woman mortgaging her separate estate to secure the *apparent* debt of herself and another, but it is her separate obligation that she is sued upon and *apparently* her own debt, and hence the burden is on her to show that her husband and not herself received the consideration for the note. See *Jenne v. Burt*, 121 Ind. 275. And we may add further, that we have found no case where a married woman has been sued on her individual promise in which she has been discharged on the ground of coverture and suretyship, except where it has appeared upon the face of the obligation that she occupied the relation of a surety or guarantor, or when the fact has been established by affirmative evidence.

The appellee's husband testified as a witness, in her behalf, to a conversation which he had with the executor and to the payment of interest due on the note, but there is nothing in his evidence to show to whom the consideration for the note moved. In fact the transaction with the executor after the testator's death, or what may have been said by him, could not have been considered by the court as tending to throw light upon the original transaction.

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The executor was called as a witness by the appellee, but he made no statement material to the question in issue.

The appellee was called as a witness in her own behalf, but testified to nothing material to the issue.

The note sued on was secured by a mortgage on the separate real estate of the wife. It is true it was executed jointly by the appellee and her husband, but this could not be otherwise, for she could not mortgage her estate to secure any debt which she might contract except her husband joined in the mortgage.

For the error in overruling the motion for a new trial, the judgment must be reversed.

Judgment reversed, with costs.

MITCHELL, J., concurs in the conclusion reached, but not with all of the reasoning found in the opinion.

Filed May 29, 1890.

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No. 14,064.

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THE WESTERN ASSURANCE COMPANY v. THE STUDEBAKER  
BROTHERS MANUFACTURING COMPANY.

**VERDICT.**—*Answers to Interrogatories.*—If there is any reasonable hypothesis whereby the general verdict and the answers to interrogatories can be reconciled, the general verdict will be sustained.

**INSURANCE.**—*Action on Policy.*—*Notice of Loss.*—*Question of Fact for Jury.*—*Verdict.*—*Judgment non Obstante Verdicto.*—Where the policy of fire insurance sued on provides that the assured shall "render a particular account of the loss" as soon after the fire as possible, it is a question of fact, to be determined by the jury from all the evidence, whether the account of the loss was sent as soon as possible; and, hence, in an action on a policy for the loss of lumber destroyed by fire, where the evidence showed that the assured was a very large manufacturing company, with many departments; that it was assured in many companies, and that the president of the company, whose duty it was to make out the detailed statement of the loss, was absent a portion of the time between the date of the fire and proof of loss, the company, a general

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verdict, supported by evidence, having been returned for the assured, was not entitled to judgment *non obstante veredicto* merely because the particular account of the loss was not sent to the company until almost two months after the fire occurred.

**SAME.**—*Lumber Destroyed.*—*Value.*—*How Determined.*—*Contract for Purchase of.*—*Inadmissibility of.*—The value of the lumber destroyed must be determined by its market value at the time and place destroyed. A contract by the assured for the purchase of lumber to be cut in another State, to be delivered in the future, is not admissible for the purpose of showing the market price of dry lumber destroyed.

**NEW TRIAL.**—*Excessive Damages.*—*Practice.*—An assignment as a cause for a new trial that the damages assessed are excessive applies only to actions for tort, and is not applicable to actions on contract.

From the Porter Circuit Court.

*F. M. Finch* and *J. A. Finch*, for appellant.

*A. Anderson* and *L. Hubbard*, for appellee.

**OLDS, J.**—This was an action brought by the appellee against the appellant on a fire insurance policy to recover for the loss of certain lumber which was destroyed by fire in the city of South Bend, on the 29th day of May, 1885. The appellant answered, first, by general denial, and, second, that the policy sued on was one of several, covering the same risk, issued by different companies, and provided that in case of loss the company should be liable for "no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon;" that said policy provided that any fraud, or attempt at fraud, on the part of the assured, should avoid the policy; that in making proofs of loss, the appellee attempted to defraud the appellant by making out and exhibiting to appellant false books and memoranda, and an exaggerated statement of the loss which it had suffered, making a showing of \$25,000 more than the real value of the lumber destroyed.

The appellee replied, by general denial. There was a trial, resulting in a verdict and judgment for appellee for \$4,726.84.

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The jury also returned answers to interrogatories. The appellant, at the proper time, moved the court for judgment upon the answers of the jury to the interrogatories, notwithstanding the general verdict, which motion was overruled.

The appellant also moved the court for a new trial for the following reasons, stated in the motion :

*First.* That the judgment, or damages, assessed by the jury, are excessive.

*Second.* That the court erred in excluding the contracts of Carter & Bro. with appellee.

*Third.* That the verdict of the jury is contrary to the evidence.

*Fourth.* That the verdict of the jury is not sustained by the evidence ; and,

*Fifth.* That the verdict of the jury is contrary to law.

The court overruled the motion for a new trial, and appellant excepted.

The errors assigned are that the court erred in overruling appellant's motion for judgment on the answers of the jury to the special interrogatories notwithstanding the general verdict, and in overruling the motion for a new trial.

The jury made answers to interrogatories as follows :

2. Q. When did the fire occur for which loss is now claimed? Ans. May 29th, 1885.

3. Q. When did the plaintiff give notice of such loss to the defendant? Ans. May 30th, 1885.

4. Q. When did the plaintiff make and send to defendant the proofs of such loss, giving a particular account thereof? Give the dates when the proofs were executed and when forwarded to the insurance company. Ans. The proofs of loss were executed July 15th, 1885, and forwarded on the 22d day of July, 1885, and were received by the defendant on the 26th day of July, 1885.

5. Q. Had the defendant insurance company an agent at South Bend? Ans. Yes.

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The appellant contends that on these answers the court should have given judgment in its favor.

The policy of insurance sued upon contained a provision that "Persons sustaining loss or damage by fire shall forthwith give notice of such loss to the company, and as soon after as possible render a particular account of such loss."

Counsel for appellant insist that as the fire occurred on May 29th, 1885, and that as the particular account of such loss was not forwarded by the assured to the appellant until the 22d day of July thereafter, it affirmatively appears that the particular account of loss was not rendered to the appellant as soon after the fire as possible, and therefore the appellant is entitled to judgment.

It is well settled by the decisions of this court that if there is any reasonable hypothesis whereby the general verdict and the answers to interrogatories can be reconciled, the general verdict will be sustained, and the motion for judgment *non obstante veredicto* overruled. *Grand Rapids, etc., R. R. Co. v. Ellison*, 117 Ind. 234.

It is likewise well settled that this court will not weigh evidence, and will not reverse a case on account of the insufficiency of the evidence if there is any evidence tending to support the verdict.

In view of the language used in the policy sued on, it became a question of fact, to be determined by the jury, as to whether or not the appellee rendered a particular account of its loss to the appellant as soon after the loss as possible. It may, or may not, have been possible for the appellee to have rendered such account prior to July 22d; this depended upon the facts and circumstances of the case. If the loss consisted of all of one particular lot of lumber, purchased and measured by an agent of the appellee, so that such person knew the actual amount destroyed, and such agent was present at the time of the fire, and was authorized to make out the proof of loss and forward it to the company, it would take but a short time to render the required account; but, under



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other circumstances, it might require days and weeks, and even months, to make out a correct account of the loss, and if the facts proven in this case were such that the jury might have found that the appellee rendered the particular account as soon as possible, then the general verdict must stand, as in that event the facts found would be consistent with the general verdict, and we think the jury might have reasonably so found from the evidence in the case.

The evidence showed the appellee to be a very large manufacturing company, engaged in manufacturing wagons, carriages, and other articles; that it is one of the largest manufacturing companies of the kind in the United States, carrying in stock an immense amount of lumber, materials, and goods, and its business operations extending over the United States and beyond. It purchased a vast amount of material, and employed thousands of men, and its business was divided into departments, each having its foreman.

The appellee was insured to the amount of over fifty thousand dollars, in some twenty different companies; a fire occurred by which it sustained a loss of over forty-six thousand dollars. A fire is an unusual occurrence; a thing not expected; not planned for; no person is set apart to ascertain the loss and make proof of it; this must be attended to by the officers and business managers; other duties may require their absence from the place of the loss. The evidence shows in this case that the president of the company attends to this duty, and that he was absent a portion of the time between the date of the fire and proof of loss; proof had to be made out for all the companies in which appellee held insurance; the books had to be examined to determine the amount of lumber purchased, and to ascertain the amount on hand at the date of the fire.

These and many other facts appeared by the evidence from which the jury may have found that the proof of loss was made as soon as possible by the appellee, and there was no error in overruling the motion for judgment *non obstante*

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*veredicto*. We might add that, from the evidence, the jury might have found that proof of loss was waived by the appellant. Shortly after the fire the adjusting agent of the appellant appeared at South Bend to investigate the loss; examined the books of the appellee; looked through their statements; visited the scene of the fire, and upon the trial of the cause no contest was made over the fact that proof was not made within the proper time, and no defence of that kind was contended for. No objection appears to have been made at any time as to the time of making the proof. The defence made was on the ground of fraud other than the failure to make the proofs in the proper time.

The next question presented and discussed by counsel for appellant is the ruling of the court in sustaining the objection of the appellee to the introduction in evidence of contracts between the appellee and J. D. Carter & Bro., of dates December 30th, 1884, and July 6th, 1885, for lumber of the character used in their business. These contracts were offered in evidence by the defendant, the appellant, and were objected to by the appellee, and the objection sustained. There was no error in this ruling.

The lumber destroyed was dry lumber; these contracts were for lumber to be delivered in the future, to be made from certain timber; it was not manufactured at the time of the contract, but to be manufactured and shipped from the State of Tennessee. The value of the lumber destroyed must be determined by its market value at the time and place destroyed, by showing what articles of the same character were worth at the time in the market at South Bend. If the evidence showed the lumber destroyed to be clear, first-class poplar lumber, of certain dimensions, and dry, then it was proper to show what clear, first-class poplar lumber, dry and of the same dimensions, was worth in the market of South Bend at the time of the fire. If there was no market for it there, and there was another market near by, then it might probably be proper to show what it was worth in the nearest

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market, and the cost of transportation ; or if none was in the market at that place, then probably it might be proper to show what such lumber was worth in the nearest market to South Bend where it could be purchased, and to prove the expense of transportation ; but the price which must govern is the market price in South Bend at the time it was destroyed. To establish this fact it would not be proper to introduce a contract whereby A. purchased of B. lumber, even of the same character, to be delivered at South Bend, at the time the loss occurred. A. may have purchased the lumber at more or less than the market price, and certainly it would not be proper to introduce a contract between two individuals showing a purchase of lumber of a different character, to be delivered at a different time, and if not proper to introduce a contract between two other parties not parties to the suit, it would not be to introduce a contract for the purchase of other lumber by the appellee. The price at which lumber had been sold by special contract might have been inquired into under certain circumstances on the cross-examination of a witness who had testified as to the market value to test his knowledge, but such contract is not proper to go in evidence to prove the market value of lumber, and the court very properly excluded the contracts offered in evidence.

The next alleged error discussed by counsel is the first cause assigned in the motion for a new trial. This is an assignment of the fourth specification for a new trial (R. S. 1881, section 559), and it has been repeatedly held by this court that this cause for a new trial only applies in actions for tort. To raise the question desired by counsel in this case the assignment of cause for a new trial should have been under the fifth statutory cause, and not under the fourth. *Smith v. State, ex rel.*, 117 Ind. 167 ; *McKinney v. State, ex rel.*, 117 Ind. 26 ; *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548 ; *Buskirk Pr.* 234.

There is no question presented by this cause for a new trial.

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 Smythe v. Scott *et al.*


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As to the other causes for a new trial, that the verdict is not sustained by sufficient evidence and is contrary to law, it is sufficient to say that the evidence sustains the verdict.

There is no error in the record.

Judgment affirmed, with costs.

Filed April 4, 1890; petition for a rehearing overruled May 29, 1890.

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 No. 14,101.

### SMYTHE v. SCOTT ET AL.

**CORPORATION.—Capacity to Sue.—Pleading.**—Where the plaintiffs in an action are described as the trustees of a certain Commandery Knights Templar, a capacity to sue is shown. The statute authorizes the incorporation of such bodies, and authorizes the election of trustees. The name under which the action is prosecuted imports a corporation.

**PLEADING.—Action against Endorser.—Sufficiency of Complaint.**—A pleading which shows that the defendant endorsed in writing and assigned to the plaintiffs the note of an insolvent maker, is sufficient to charge him with liability on the endorsement.

**SAME.—Endorsement.—Non-Liability of Endorser by Agreement.—Answer Alleging.—Reply.**—In an action against an endorser, where the answer alleges that the endorsement was made without consideration, and that the defendant simply lent the money as an agent of the plaintiffs, and under an agreement that he should not be liable if the borrower proved insolvent, a reply averring there was a consideration for the endorsement does not avoid all the allegations of the answer, and is bad.

**SAME.—Complaint.—Sufficiency of.**—An averment in the complaint that the defendant received a large sum of money as the treasurer of the plaintiffs, and that "although he has often been requested so to do, has failed and refused to account for and pay over said money," is a sufficient allegation that the defendant is indebted to the plaintiffs, and that the debt is unpaid.

From the Putnam Circuit Court.

*H. H. Mathias* and *H. C. Lewis*, for appellant.

*M. A. Moore*, *G. C. Moore* and *S. A. Hays*, for appellees.

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Smythe v. Scott *et al.*

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ELLIOTT, J.—The plaintiffs in this action are described as the trustees of Greencastle Commandery of Knights Templar, and the action is prosecuted to recover from the appellant money received by him as treasurer of the commandery and wrongfully converted to his own use; and also to recover from him the amount of a promissory note upon which he is alleged to be liable as an endorser.

The point is made by the appellant's counsel that the appellees have not shown capacity to sue, but in this they are in error. The statute of the State authorizes the incorporation of such bodies as Knights Templar and authorizes, also, the election of trustees. The name and style under which the action is prosecuted "argues," as some of our cases say, "a corporation," or, as others say, imports a corporation. *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527, and cases cited; *Adams Express Co. v. Harris*, 120 Ind. 73, and authorities cited p. 77. The court on a former appeal treated the appellees as the trustees of a corporation. *Smythe v. Scott*, 106 Ind. 245.

The first paragraph of the amended complaint is sufficient. It contains some unnecessary allegations, but surplusage will not vitiate a pleading. The pleading shows that the appellant assigned a note to the commandery; that the maker was notoriously insolvent, and this is sufficient to charge the appellant with liability as an assignor. The case is not controlled by the decision in *Williams v. Osbon*, 75 Ind. 280, for here the complaint shows that the note was endorsed in writing and contains a copy of the endorsement.

What has been said of the first paragraph of the complaint disposes of the objections urged against the second.

The third paragraph of the complaint alleges that the appellant received a large sum of money as the treasurer of the commandery, and that "although he has often been requested so to do has failed and refused to account for and pay over said money to the said commandery." The quotation we have made from the pleading sufficiently answers

the objections of the appellant that it does not show that he is indebted to the commandery, and that the debt is unpaid.

The second paragraph of the answer admits the endorsement of the note, and alleges that it was made without consideration. The third paragraph alleges, in substance, that the defendant was authorized and instructed to lend the money in his hands as treasurer; that it was agreed that he should not be responsible for the solvency of the borrower, and that the money was lent to the maker of the note, under this agreement. The fifth is substantially the same as the third, the chief difference being that it is averred that there was no consideration for the endorsement.

To these paragraphs of the answer the appellees replied.

The second paragraph of the reply avers that the endorsement was not without consideration, but was made on a good and valid consideration. The reply is clearly bad, for it does not avoid the allegations of the third and fifth paragraphs of the answer. If, as those paragraphs allege, the defendant simply lent the money as an agent of the commandery, and under an agreement that he should not be liable in case the borrower proved insolvent, the fact that there was a consideration for the endorsement does not, in itself, render him liable.

The third paragraph of the reply is good, inasmuch as it is at least an argumentative denial of the material facts pleaded in the answers. The fourth paragraph of the reply may, perhaps, be upheld on the ground that it shows such negligence in making the investment as avoids the defence pleaded.

The appellees have assigned cross-errors, but the only specification that it is proper for us to notice is the one which assails the ruling holding the fourth paragraph of the complaint to be bad. We need not decide whether if a definite time is granted the maker of a promissory note at the request of the assignor it will excuse the holder of the note from taking steps to collect it, for here there is no allegation

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Ringgenberg *et al.* v. Hartman *et al.*

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of that kind. There is a vague and indefinite allegation that the assignor said that if the maker was given time he would pay the note, but there is no direct or positive allegation that a definite extension of time was granted at the request of the assignor. The ruling of the trial court upon the fourth paragraph of the complaint was right.

For the error in overruling the demurrer to the second paragraph of the reply the judgment must be and is reversed.

COFFEY, J., took no part in the decision of this case.

Filed May 29, 1890.

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No. 13,227.

RINGGENBERG ET AL. v. HARTMAN ET AL.

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**REPLEVIN.**—*Action upon Bond.*—*Pleading.*—In an action upon a replevin bond, where the answer alleges that the question of title was not in issue in the replevin suit, it is a harmless error to sustain a motion to strike out a part of the cross-complaint in which it is alleged that the clerk of the court, by inadvertence, wrote up as the judgment of the jury in the replevin suit that the defendants in that suit were adjudged to be the owners of the property.

**SAME.**—*Notes.*—*Set-Off.*—In an action upon a replevin bond executed in favor of both plaintiffs, notes held against one of the plaintiffs by the defendants are not available as a set-off. The defendants are estopped to deny that one of the obligees had no interest in the bond sued upon.

**SAME.**—*Evidence.*—*Mitigation of Damages.*—Where the defendants in an action upon a replevin bond hold a chattel mortgage upon the property involved in the replevin suit, they may prove that fact in mitigation of damages.

From the Marshall Circuit Court.

*J. D. McLaren, E. C. Martindale and H. Corbin*, for appellants.

*A. C. Capron, J. W. Parks and M. A. O. Packard*, for appellees.

COFFEY, J.—This was a suit in the circuit court by the

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*Ringgenberg et al. v. Hartman et al.*

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appellees against the appellants upon a replevin bond. The complaint alleges that prior to the 17th day of May, 1873, the appellees were the owners of a livery stock of the value of \$3,000, kept and owned by them in carrying on the livery business at Bourbon, Indiana; that on the 16th day of May, 1873, the appellants Ringgenberg & Ringgenberg commenced an action of replevin, in the Marshall Circuit Court, against the appellees, wherein they claimed to be the owners and entitled to the possession of all said livery stock; that they caused a writ of replevin to issue in said case and placed the same in the hands of the sheriff of Marshall county for execution and service; that on the 17th day of May, 1873, said sheriff seized and took into his possession all of said property by virtue of said writ; that said appellants Ringgenberg & Ringgenberg executed the replevin bond in suit with the other appellants as their sureties, and delivered the same to said sheriff who thereupon delivered said property to the said Ringgenberg & Ringgenberg, who took the same into their possession; that upon the trial of said cause the appellees were adjudged to be the owners of said property, and recovered a judgment for the return thereof and for costs taxed at \$300; that appellants wholly failed to return said property, and converted the same to their own use.

The appellants filed an answer in four paragraphs. The second is a former adjudication of the matters involved in this suit.

The third paragraph is a plea of payment as to the damages and costs.

The fourth paragraph admits the institution of the suit set up in the complaint, the execution of the bond in suit, the trial of the cause and judgment of return of the property, and avers that in said trial the value of said property was found to be \$1,350; that prior to that time the appellants had sold the property to the appellee Hartman, and had taken back a chattel mortgage to secure \$1,600 of the



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purchase-price; that at the time of the commencement of this suit, \$1,494.96 of said purchase-money was due; that said appellees are wholly insolvent and were so at the time of said trial; that by the terms of said mortgage, appellants were entitled to the possession of said property upon default in the payment of any part of said purchase-money; that at the time of the commencement of said action of replevin, said Hartman was the sole owner of said property, and that the said Galentine had no interest therein; that on the 8th day of August, 1883, \$475 of said purchase-money became due and remained unpaid, and appellants became entitled to the possession of said property under the terms of said mortgage; that they elected to retain possession of said property, the same being in value \$500 less than the claim of appellants against said Hartman; that appellants have paid the damages and costs recovered in said action of replevin. Prayer, that the amount due on the purchase-money notes be set off against any sum found due appellees.

The appellants also filed a cross-complaint setting up, substantially, the same facts as are averred in the fourth paragraph of the answer, with these additional allegations: "And the said defendants further show the court that by the misprision of the clerk of the court, in writing up the judgment of the court, on the verdict of the jury in said replevin suit No. 6307, by inadvertence and mistake, wrote up as and for the judgment, that the defendants in that suit, the plaintiffs in this, were adjudged to be the owners of the property, the right to the possession of which was the sole and only question put in issue by the complaint and answer thereto, and that was the only question presented to and found by the jury in their verdict, and the judgment of ownership is outside and beyond the issue in the case and the verdict of the jury, and so far it is void and of no effect."

On motion of the appellees the language above set forth was stricken out of the cross-complaint, and the appellants excepted.

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This cross-complaint also seeks to set off against the amount due appellees, as set out in their complaint, the amount due appellants on their notes and mortgage against the appellee Hartman.

The fifth paragraph of answer was a general denial.

The court sustained a demurrer to the fourth paragraph of the answer and to the cross-complaint, and appellants excepted.

Appellees filed a reply, and the cause being at issue was tried by the court, without the intervention of a jury.

At the request of the appellants the court made a special finding of the facts, and stated its conclusions of law thereon, and rendered judgment for the appellees.

The appellants assign as error in this court:

1st. That the court erred in striking out parts of appellants' cross-complaint.

2d. That the court erred in sustaining the demurrer to the fourth paragraph of appellants' answer.

3d. That the court erred in sustaining the demurrer to the cross-complaint of the appellants.

4th. That the court erred in its conclusions of law.

5th. That the court erred in overruling the appellants' motion for a new trial.

As the court, subsequent to striking out a part of the cross-complaint filed by the appellants, sustained a demurrer thereto, it is not improper to consider the first and third assignments of errors together.

It is to be observed that the action of replevin, out of which grew the bond in suit, was instituted by the appellants Ringgenberg & Ringgenberg against both Hartman and Galentine, and the bond is made payable to them jointly. In that suit the value of the property was ascertained by the jury, and judgment was rendered by the court, reciting that they were the owners of such property, and that the same should be returned to them, and in the event a return could

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not be had, that they recover of the appellants such ascertained value.

It is contended by the appellants that as it is averred in the cross-complaint that no question involving the title to the property was in issue in the replevin suit, any judgment rendered upon that subject, by which the court sought to settle the question of title, was void, and that, therefore, the court erred in sustaining the motion of the appellees to strike out the language above set forth.

In the case of *McFadden v. Ross*, 108 Ind. 512, which was a suit upon a replevin bond, it was held that the judgment of a court, upon matters not involved in the issues, was void, and that it might be inquired into and impeached collaterally.

Primarily the action of replevin is possessory in its character, and unless the title to the property is put in issue by the form of the issues, a judgment in such action determines nothing beyond the right of possession. *Entsminger v. Jackson*, 73 Ind. 144; *Kramer v. Matthews*, 68 Ind. 172; *Highnote v. White*, 67 Ind. 596; *Hoke v. Applegate*, 92 Ind. 570; *Van Gorder v. Smith*, 99 Ind. 404.

It does not follow from this rule, however, that the court erred in sustaining the motion to strike out part of the cross-complaint. If the title to the property was not involved in the issues in the replevin suit, any judgment attempting to settle the title would be ignored by the courts whenever an attempt was made by either party to take advantage of it. The charge that the clerk by mistake and inadvertence entered up a judgment declaring the appellees the owners of the property involved in the replevin suit added nothing to the strength of the cross-complaint, for the allegations were still left, to the effect that the question of title was not in issue in that suit. It must be plain, then, that if the complaint was otherwise good the appellants were not injured by striking out the portion to which the motion was addressed. And this brings us to the question as to whether appellants were entitled to avail themselves of their notes

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against Hartman as a set-off in this action. This question, we think, must be answered in the negative. It is a fundamental principle that a set-off can not exist in a case where there is a want of mutuality. The claims must be due between all the parties and in the same right. *Proctor v. Cole*, 104 Ind. 373, and authorities there cited.

As we have seen, the bond in suit was executed in favor of both the appellees, while the notes sought to be set off were due from Hartman alone. Not only is the bond due to both the appellees but the judgment of return is in favor of both. Nor do we think the averment that Galentine had no interest in the property helps the appellants.

If parties who execute obligations to two or more persons may, when sued upon such obligations, say that one or more of the parties to whom the obligation is payable have no interest in it, there would be no certainty in business transactions. We think the appellants should be held to be estopped from denying that Galentine has an interest in the bond now in suit. *Menaugh v. Chandler*, 89 Ind. 94. Especially should this be so in view of the judgment in Galentine's favor for a return of the property involved in the suit in which the bond was executed. In our opinion the court did not err in sustaining the demurrer to the cross-complaint.

What we have said with reference to the right to use the notes of Hartman as a set-off, in discussing the questions arising on the cross-complaint, applies, also, to the fourth paragraph of the answer. That answer was bad for the reasons above stated.

On the trial of the cause, for the purpose of mitigating the damages to be recovered by the appellees, the appellants offered in evidence the chattel mortgage upon the property involved in the replevin suit, in which the bond now sued on was executed, and offered to prove that the notes secured by said mortgage were unpaid, but upon the objection of the appellees this offered evidence was excluded.

In this ruling we think the court erred. If the appellees

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were the absolute owners of the property its value would have been the measure of damages; but if the appellants held a valid subsisting chattel mortgage upon it, they were entitled to prove that fact in mitigation of damages, unless they were estopped from so doing. *Wallace v. Clark*, 7 Blackf. 298; *Stockwell v. Byrne*, 22 Ind. 6; *Miller v. Cheney*, 88 Ind. 466; *Smith v. Mosby*, 98 Ind. 445; *McFadden v. Ross*, *supra*.

In the case last cited there had been a trial by the court as to the value of the property and return adjudged, but it was held in a suit on the replevin bond that the appellants in that case were entitled to prove, in mitigation of damages, that they held a valid subsisting mortgage upon the property involved in the suit in which the bond was executed.

The contention of the appellees that there is a want of mutuality, and that, therefore, the notes and mortgage were not admissible, is without force. If Galentine acquired an interest in the property after the execution of the chattel mortgage, it was of no greater value in his hands, subject to the mortgage, than if it had remained in the hands of Hartman.

For the error of the court in excluding this evidence the judgment must be reversed.

Judgment reversed, with directions to the circuit court to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed June 3, 1890.

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Boyd v. Mill Creek School Township.

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No. 14,275.

## BOYD v. MILL CREEK SCHOOL TOWNSHIP.

TOWNSHIP.—*Certificates.—Fraudulent Issue of.—Rights of Assignee.*—By a conspiracy between a township trustee and the plaintiff's assignor certificates of indebtedness were issued for lightning-rods erected on the school-houses of the township to an amount almost four times their value. One of the certificates was assigned to the plaintiff, who seeks a recovery upon it against the township.

*Held*, that the certificate is void, and that the township, although it has not rescinded the contract, and retains the benefit thereof, is not bound upon it.

*Held*, also, that the assignee is not entitled to recover on the certificate the actual value of the goods furnished the township.

From the Fountain Circuit Court.

C. M. McCabe, for appellant.

T. F. Davidson, for appellee.

MITCHELL, J.—Mill Creek school township was sued by Boyd, assignee of a certificate issued by the township trustee who certified over his hand that there was due the plaintiff's assignor the sum of \$797.85, payable in one year, with eight per cent. interest, for erecting lightning-rods on certain school-houses. Within issues duly submitted for trial, a jury returned a special verdict, from which we extract the following facts:

In 1885 the plaintiff's assignor, by agreement with the trustee of Mill Creek township, furnished materials and erected lightning-rods on twelve school-houses in the township, the material and work being reasonably worth \$312.60, and no more. The work was accepted by the trustee, who issued five certificates therefor, similar in effect to the one sued on, by which he purported to bind his township to pay \$1,394.35 for the lightning-rods erected. These certificates were issued in pursuance of a conspiracy entered into by and between the plaintiff's assignor and the township trustee,

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Boyd v. Mill Creek School Township.

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the purpose of which was to create a fictitious debt against the township. The certificate sued on was assigned to the plaintiff, and the others were assigned to persons named, and are still outstanding and unpaid.

Upon the facts returned the court gave judgment that the plaintiff take nothing. On the appellant's behalf, it is insisted that, since the township elected not to rescind the contract and relinquish all benefits under it by returning the property within a reasonable time it is bound, and must pay the amount called for by the certificates, or at least the actual value of the property received and retained by it. Neither of the positions contended for can be maintained as applicable to the facts in the present case:

1. The facts found make it clear that the plaintiff is not the holder of a valid cause of action against the township. The certificate upon which the action is predicated originated in an unlawful and corrupt conspiracy to defraud a public corporation, and is therefore void.

An agreement, or conspiracy, between two persons which has for its object the perpetration of a fraud, or civil injury, upon another, is illegal; and any agreement to carry out or consummate a scheme which involves a breach of trust, or official duty, is unlawful and void. 3 Am. & Eng. Encyc. of Law, 870. Transactions such as the one disclosed by the special verdict are an unmixed evil, inherently corrupt and vicious; repugnant to good morals and public policy. Courts will neither listen to nor recognize a party whose cause of action rests upon a contract made "in violation of common decency, public morality, or the law." *Oscanyan v. Arms Co.*, 103 U. S. 261; *Jackson v. Ludeling*, 21 Wall. 616; *Woodstock Iron Co. v. Richmond, etc., Extension Co.*, 129 U. S. 643.

The township trustee occupied a relation of trust and confidence to his township, and when he conspired with another to create a fictitious indebtedness against the corporation by issuing certificates of indebtedness to an amount more than four times the value of what had been received, he was en-

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gaged, if not in a criminal conspiracy, in one so corrupt, immoral and scandalous, that no right of action can be predicated upon any contract connected with or growing out of the transaction.

If anything is settled by the decisions, it is that promissory notes illegally issued by a township trustee are void in their inception, and create no right of action against any one. *Grimaley v. State, ex rel.*, 116 Ind. 130; *State, ex rel., v. Hawes*, 112 Ind. 323.

When a township trustee acts within the law he may bind his township by contracting a debt for supplies reasonably necessary for the use of the schools of his township. But the contract can only be enforced when the trustee had authority to make it, and then only so far as it represents a debt honestly and legitimately contracted for supplies which the township trustee in the honest exercise of his discretion judged necessary for the use of the township, and which the township actually received. *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Jefferson School Tp. v. Litton*, 116 Ind. 467; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; *Boyd v. Black School Tp.*, 123 Ind. 1.

2. In respect to the claim that the plaintiff was entitled to recover the actual value of the goods furnished the township, it is enough to say he furnished the township nothing, nor does he claim as the equitable assignee of any one who furnished material or performed work and labor for the benefit of the township. He sues as the assignee of a contract, and the only question is as to his right to recover on the contract sued on. *Pearce v. Madison, etc., R. R. Co.*, 21 How. 441; *Marsh v. Fulton County*, 10 Wall. 676. It is quite true that where a municipal corporation receives money into its treasury, or property, or work and labor, which is of value to it through a contract, or by the issuing of bonds or notes that are void, an action may be maintained to recover the money received or the value of the property appropriated. *Schipper v. City of Aurora*, 121 Ind. 154; *Cox v. McLaughlin*, 76 Cal.



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60 ; *Louisiana v. Wood*, 102 U.S. 294. But no recovery can be had on the illegal contract. The suit must be on the *quantum meruit* for money had and received, or for goods sold and delivered. The plaintiff as the holder by assignment of one of the five certificates which originated in the corrupt conspiracy would have no right to recover the actual value of the property received by the township to the exclusion of the holders of the other certificates.

The judgment is affirmed, with costs.

Filed June 3, 1890.

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No. 15,349.

COLGLAZIER, ADMINISTRATOR, v. COLGLAZIER.

**EVIDENCE.—Exclusion of.**—Where offered evidence is at all material, and is relevant, it is error to exclude it; and this error will be available for reversal except in cases where it clearly appears that the exclusion works no harm.

**WITNESS.—Exclusion.—Withdrawal of Objection.**—Where a witness is excluded, and the objecting party afterwards withdraws his objection, and the court offers to permit the witness to testify, the error, if any, in the first ruling, is completely obviated.

From the Washington Circuit Court.

*D. M. Alsbaugh, J. C. Lawler, S. H. Mitchell and R. B. Mitchell*, for appellant.

*S. B. Voyles, H. Morris, J. A. Zaring and M. B. Hottel*, for appellee.

**ELLIOTT, J.**—The facts stated as the cause of action are set forth in the opinion given in this case when it was in this court for the first time. *Colglazier v. Colglazier*, 117 Ind. 460. It is unnecessary, therefore, to restate them.

The principal question presented on this appeal arises on

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the ruling denying the appellant's motion for a new trial. The trial court suppressed questions and answers contained in a deposition, and the appellant insists that this ruling was erroneous.

Question 5 reads thus: "Did you at any time reside with your father on his farm in Washington county, Indiana? If so, state when it was, and how long you resided there, and the date you left there?" The answer of the witness is as follows: "I went there in '63 or '64, I can't say which, and I left there in the fall of '73." It is evident that no material error was committed in sustaining the motion to suppress this question and answer.

Question 6 reads thus: "If you had any conversation with Samuel Colglazier about leaving your father's place and giving the same up to him, state what it was? State what it was and all about it." The answer reads as follows: "A while before I left there, the year I couldn't state, my brother got to talking to me; he said I could do better elsewhere, and offered me the use of \$1,000 as long as my father lived, without any interest, if I would leave the place; also saying that I could do with the \$1,000 as I pleased, put it into land or anything I wanted to. I told him I didn't propose giving him my note or getting into his debt."

Question 7 is as follows: "If Samuel Colglazier took charge of your father's property, state when it was, and under what agreement or arrangement between them did he take such charge if you know?" The answer reads thus: "One evening as I was passing the house I overheard a conversation between Samuel and my father, in which Samuel said if he would drive me away that he would take charge of his affairs, and that if he wanted any money to give me to go away he would furnish it, representing that I was letting everything go to ruin, and mismanaging the business, and that he could run the business better than I could. My father said he would not drive me away."

It is charged in the complaint that the appellee took ad-

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vantage of his father's feebleness and secured control of his property, and that he prevented his father from consulting with other members of his family, and we think the evidence was competent, and was relevant to the averments mentioned, as it supplied grounds for inferring that the appellee was scheming to get his brother away from home and thus secure control of the father's property. It may be true that the excluded evidence is not of very great probative force, but, granting this, still the appellant was entitled to have it go to the court or jury for whatever it was worth. The rule upon this subject was thus laid down in the case of *Harbor v. Morgan*, 4 Ind. 158: When evidence is pertinent to the issue it should be admitted, however little it may seemingly tend to prove. This is, perhaps, rather a stronger statement than the authorities warrant, but the general doctrine asserted has often been declared and enforced. *Bedgood v. State*, 115 Ind. 275 (280); *Pedigo v. Grimes*, 113 Ind. 148; *Grand Rapids, etc., R. R. Co. v. Diller*, 110 Ind. 223. The rule which the authorities recognize is that where the evidence is at all material and is relevant, it is error to exclude it. There are exceptional cases in which the court can say that the finding or verdict is so clearly right that the exclusion of the evidence could have worked no harm, but this is not such a case. *Aetna Life Ins. Co. v. Deming*, 123 Ind. 384.

Where a witness is excluded and the objecting party afterwards withdraws his objection, and the court offers to permit the witness to testify, the error, if any, in the first ruling is completely obviated. *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409 (431).

For the error in suppressing the parts of the deposition we have indicated the judgment is reversed.

Filed April 4, 1890; petition for a rehearing overruled June 3, 1890.

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 Allemong *et al.* v. Simmons *et al.*


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No. 13,308.

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## ALLEMONG ET AL. v. SIMMONS ET AL.

**VERDICT.**—*Answers to Interrogatories.*—*Judgment.*—Where there is any reasonable hypothesis upon which the general verdict and the answers to interrogatories can be reconciled, the general verdict will control the judgment of the court.

**CORPORATION.**—*Railroad.*—*Contract for Construction of Roadway.*—*Director's Unauthorized Act.*—A railroad company is not bound by a contract for the construction of the roadway made by one of its directors without authority; and the fact that the director owns a majority of the stock of the company does not alter the rule.

**SAME.**—*Garnishment.*—*Estoppel.*—The director of a railroad company, with whom the company had a contract for the construction of a portion of its roadway, without authority from the company, made in the company's name a contract with certain contractors for the same portion of the roadway. After the contract was made the company was consolidated with another company. An action was brought upon an indebtedness claimed to be due from the contractors to the plaintiffs, and the corporations were garnisheed. There was no evidence that when the work was done under the contract by the principal defendants, either of the corporations had any knowledge of the unauthorized contract of the director. Although the corporations were garnisheed there was nothing to indicate that the contractors were looking to them for payment; nor did the estimates, which showed no more than that the materials furnished and work done were for the building of the line of the road of the consolidated corporation, indicate that the contract was made with the company. Estimates were made by the director's engineer to the chief engineer of the consolidated corporation, he supposing that they were for work done and material furnished by the director to the corporation under his contract.

*Held*, that on the evidence the company was not estopped to deny the indebtedness claimed.

From the Marion Superior Court.

*J. L. McMaster* and *A. Boice*, for appellants.

*G. W. Friedley* and *G. R. Eldridge*, for appellees.

**BERKSHIRE, J.**—This action was brought by the appellants Allemong, Baer, and Henking, upon an indebtedness alleged to be due them from the appellees Ayleshire and Simmons. At the same time proceedings in attachment were

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instituted, and proceedings in garnishment commenced against the appellees the Louisville, New Albany and Chicago Railway Company, and the Chicago and Indianapolis Air Line Railway Company.

The other appellants became parties to the action as claimants, filing under the proceedings in attachment.

Issues were joined in the main action, and also in the ancillary proceeding. There was a jury trial, and a general verdict returned by the jury against the appellees Simmons and Ayleshire in both the main action and the proceedings in attachment, and in favor of the appellees, the said corporations.

At the same time the jury returned certain interrogatories that had been propounded to them, together with their answers thereto.

The appellants moved for judgment upon the answers to the said interrogatories, notwithstanding the general verdict in favor of the said Louisville, New Albany and Chicago Railway Company, and the said Chicago and Indianapolis Air Line Railway Company, which motion the court overruled, and the appellants excepted.

The appellants then moved for a new trial, which motion was overruled, and they reserved exceptions.

There were some other motions made by the appellants, but as the whole ground is covered by the questions presented by the motions for a judgment *non obstante* and for a new trial, we need not notice them further.

From the judgment rendered at special term the appellants appealed to general term, and assigned error, and the judgment at special term having been affirmed in general term, they prosecute this appeal, and assign as error the ruling of the court in general term affirming the judgment at special term.

The following are the interrogatories propounded to the jury, together with the answers to the same :

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**"THE PLAINTIFFS' INTERROGATORIES.**

"The plaintiffs then asked to submit the following interrogatories in case the jury made a general verdict, which were submitted to the jury, and answered as follows:

"1. Was not the Chicago and Indianapolis Air Line Railway Company incorporated under the laws of the State of Indiana on the 27th day of January, 1880? Answer. Yes.

"2. Was not the railway company mentioned in the preceding question consolidated with the Chicago and Dyer Railroad company, a corporation of the State of Illinois, on the 29th day of January, 1880, under the name and style of the Chicago and Indianapolis Air Line Railway Company, by articles of consolidation? Answer. Yes.

"3. Was not Henry Crawford a director in said consolidated company last named? Answer. Yes.

"4. Was not Henry Crawford the owner of five-sixths of the stock of said company, and if not, how much did he own? Answer. Yes.

"5. Did not the defendants, James A. Simmons and Joseph P. Ayleshire, have a contract for the construction of the roadway of said consolidated company from Delphi, Carroll county, Indiana, to Indianapolis, Marion county, Indiana, purporting to be executed in the name of said Chicago and Indianapolis Air Line Railway Company, by Henry Crawford on the one part, and the said Simmons and Ayleshire on the other part, bearing date June 28th, 1881? Answer. Yes.

"6. Did not said Simmons and Ayleshire believe in good faith that said contract was what it purported to be, namely, a contract between them and said Chicago and Indianapolis Air Line Railway Company? Answer. Yes.

"7. Did not said Simmons and Ayleshire work upon the construction of said roadway, believing in good faith that it was a valid and subsisting contract between them and said company, and so believing, were not said Simmons and Ayleshire at work upon the construction of said roadway under

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*Allemon et al. v. Simmons et al.*

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said contract in and during the month of May, 1882? Answer. Yes.

"8. Were not the estimates made out in the name of said company, showing the work of construction to have been done by said Simmons and Ayleshire for said company, and was not that the way in which their construction accounts were stated? Answer. No.

"9. Was not the estimate for the work done by said Simmons and Ayleshire in the construction of said roadway for the month of May, 1882, made out in the form and manner stated in the last preceding question? Answer. Yes.

"10. Did not said estimate for the month of May, 1882, show said company to be indebted to said Simmons and Ayleshire in the sum of \$6,857.17, after deducting the five per cent. reserved by said company? Answer. Yes.

"11. Did not said statement show the reserve of five per cent. on the cost of construction retained in the hands of said company to be \$11,996.22 at that time? Answer. Yes.

"12. Were not these amounts the sums then due to said Simmons and Ayleshire upon the work of construction prior to and during the month of May, 1882? Answer. Yes.

"13. Was not the Chicago and Indianapolis Air Line Railway Company consolidated with the Louisville, New Albany and Chicago Railway Company August 10th, 1881, the name of the consolidated company being the Louisville, New Albany and Chicago Railway Company? Answer. Yes.

"14. Was not Marshall Morris the chief engineer of said consolidated company, and superintendent of the construction of the roadway thereof between said Delphi and Indianapolis from March, 1882, until after the completion of the same? Answer. Yes.

"15. Was not said Morris acting in that capacity prior to and during the month of May, 1882, and for some time subsequent thereto? Answer. Yes.

"16. Did not said Morris see said contract for construc-

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tion, purporting to be between said Simmons and Ayleshire and said Chicago and Indianapolis Air Line Railway Company, and did he not know that said Simmons and Ayleshire were working thereunder? Answer. Yes.

"17. Did not said Morris have the knowledge referred to in the previous question, prior to and during the month of May, 1882, and did not he see the estimates made before and for said month, and subsequent thereto? Answer. Yes.

"18. Did not the Louisville, New Albany and Chicago Railway Company accept the work done as aforesaid by said Simmons and Ayleshire, after said Morris had seen said contract and said estimates of said work done upon said roadway? Answer. Yes.

"19. Was not said Louisville, New Albany and Chicago Railway Company served with summons as garnishee in this action on the 15th day of May, 1882? Answer. Yes.

"20. Are there not due from the defendants, Simmons and Ayleshire, to the several plaintiffs herein, sums as follows:

To Albert W. Allemong, Louis Baer and	
Frederick C. Henking . . . . .	\$1,334 10
To John and Edward Henderson . . .	1,594 92
To John Doges and Wm. H. Andrews .	1,818 11
To John T. Holliday, Frank J. Holliday and Wm. H. Harvey . . . . .	690 12
To Sylvanus M. Brandyberry . . . .	97 96
To James M. Kerr . . . . .	832 76

"Answer. Yes.

"21. Were not the defendants, Simmons and Ayleshire, non-residents of the State of Indiana at the time of the commencement of this action, and are they not still such non-residents? Answer. Yes.

"THE DEFENDANT'S INTERROGATORIES.

"The Louisville, New Albany and Chicago Railway Company, defendant, asked the following interrogatories, which were submitted and answered as follows:



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"Interrogatory No. 1. Do you find from the evidence that the New Albany company paid Simmons, Ayleshire & Co. any money for work done by them on the Air Line after the consolidation? Answer. No.

"Interrogatory No. 2. If you answer the first interrogatory, 'Yes,' then state the amount paid and by whom paid, and the date of such payment. Answer. —

"Interrogatory No. 3. Do you find from the evidence that the New Albany company had any dealings or transactions with Simmons, Ayleshire & Co. after the consolidation, as contractors, other than through Henry Crawford as the original contractor? Answer. No.

"Interrogatory 4. If you answer interrogatory No. 3, 'Yes,' then state what such dealings and transactions were, with whom had, and when, as shown by the evidence? Answer. —

"Interrogatory No. 5. Do you find from the evidence that the New Albany company paid all money it paid out after the consolidation, for constructing the Air Line road, to Henry Crawford? Answer. Yes.

"Interrogatory No. 6. If you answer the last interrogatory in the negative, then state from the evidence to whom said New Albany company paid such moneys, other than Crawford, after the consolidation, and the amounts and dates of such payments. Answer. —.

"Interrogatory No. 7. Do you find from the evidence that the New Albany company settled in full with Henry Crawford for all work done in constructing the Air Line road? Answer. Yes."

We do not think the court erred in overruling the said motion.

It is a well-established rule of this court, that if there is any reasonable hypothesis upon which the general verdict, and the answers returned by the jury to interrogatories propounded to them, can be reconciled, the general verdict will control the judgment of the court. *Redelsheimer v. Miller*,

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*Allemong et al. v. Simmons et al.*

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107 Ind. 485; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460; *Grand Rapids, etc., R. R. Co. v. Ellison*, 117 Ind. 234.

We observe no inconsistency between the general verdict and the answers to the interrogatories.

The answers to the interrogatories, as will appear further on when we come to discuss the questions arising upon the action of the court in overruling the motion for a new trial, disclose no indebtedness existing between the appellees Simmons and Ayleshire, and the appellee the said corporation.

It must be conceded that the appellee the said Louisville, New Albany and Chicago Railway Company, after the consolidation, became bound to perform all of the obligations yet to be performed of the other appellee corporation, and liable for the payment of all of its outstanding indebtedness, and if the said appellee, the said Chicago and Indianapolis Air Line Railway Company, was bound to the performance of the stipulations and obligations as the party of the second part of the contract that had been entered into with Simmons and Ayleshire, then the said appellee, the said Louisville, New Albany and Chicago Railway Company, became so liable.

But the evidence discloses no such liability on the part of said Chicago and Indianapolis Air Line Railway Company. The contract was executed June 28th, 1881, and was signed by Simmons & Co. for themselves and by Henry Crawford for the railway company.

There is not one scintilla of evidence to indicate that Crawford had any authority to enter into the contract for the railway company; upon the other hand, the evidence discloses that he had no such authority. It is true Crawford was one of the directors of the company, and held a majority of the stock, but the existence of these facts conferred upon him no power to make contracts for the corporation. It could only be bound by the action of its board of directory;

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*Allemon et al. v. Simmons et al.*

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the board could have conferred on Crawford this power, but there was no evidence that it had done so.

Crawford, as one of the directors, had no more authority or power than any other director ; the board consisted of five members, and three constituted a quorum ; less than three could make no binding contract for the corporation. *Harris v. Muskingum Mfg. Co.*, 4 Blackf. 267 ; *Gashwiler v. Willis*, 33 Col. 11.

Section 9 of the act under which the Chicago and Indianapolis Air Line Railway Company was organized, provides that "The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company not inconsistent with the laws of this State, and prescribing the duties of officers, artificers and servants that may be employed, and for the appointment of all the officers for carrying on all the business within the object and purposes of such company." Section 3897, R. S. 1881.

This, of course, means a majority of the directors. There is no provision in the statute giving to the stockholders any such power. *Morawetz Corporations*, sections 243, 337 ; *Pierce Railroads*, 30.

The contract which Simmons and Ayleshire executed with Crawford was the mere personal engagement of Crawford with the said parties. *Tileston v. Newell*, 13 Mass. 406 ; *Harris v. Muskingum Mfg. Co.*, *supra* ; *Roberts v. Button*, 14 Vt. 195 ; *Wheelock v. Moulton*, 15 Vt. 519 (522).

There is nothing in the evidence tending to show an estoppel.

At the date at which the contract was made with Simmons and Ayleshire the two corporations had each a contract with Crawford to furnish the materials and construct that part of the road covered by the contract with Simmons and Ayleshire.

There is nothing to indicate that when the work was done,

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*Allemong et al. v. Simmons et al.*

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covered by the May estimate of 1882, the corporations, or either of them, had knowledge of the contract with Simmons and Ayleshire. It is true the said appellees had been summoned to answer to the proceedings in garnishment, but there was nothing to disclose to them that Simmons and Ayleshire were looking to them, or either of them, for payment.

There is nothing in the estimate to indicate that the work was done or the materials furnished under a contract with the appellee, the said Chicago and Indianapolis Air Line Railway Company, or that it was so claimed. The estimate indicated that the materials furnished and work done were in building the line of road owned by the consolidated corporations, but they had the right to suppose that they were chargeable with the materials and work to Crawford under the contracts made with him.

The witness Morris, whose deposition was taken by the appellees, but read in evidence by the appellants, testified that the estimates were made by Jackson, Crawford's engineer, and that they came to him, as he supposed, for work done and materials furnished to the said corporations by said Crawford under his contract with them.

Simmons and Ayleshire were bound to a knowledge of the law when they entered into the contract, and to know that Crawford could not bind the corporation without its authority given so to do. The evidence shows that the appellees, the said corporations, acted in good faith, and paid the party in full with whom they contracted.

In their depositions Lewis, the secretary and treasurer, and Veech, the president of the consolidated corporation, testify that the said corporations had no contract with Simmons and Ayleshire, and that there was no indebtedness due from the said corporations, or either of them, to the said parties.

We have not noticed the instructions complained of. They

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Conley v. Grove et al.

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were more favorable to the appellants than they had a right to ask.

The court might with great propriety have instructed the jury to find for the appellees, the said corporations.

We find no error in the record.

Judgment affirmed, with costs.

Filed Feb. 20, 1890; petition for a rehearing overruled June 3, 1890.

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No. 14,323.

CONLEY v. GROVE ET AL.

HIGHWAY.—*New.—Removal of Fence.—Notice.—Injunction.*—The statute (section 5030, R. S. 1881) requires the supervisor, when a public highway shall have been laid out through any inclosed land, to give sixty days' notice in writing to the owner, or occupant, to remove the fence; but such owner, or occupant, shall not be compelled to remove the fence between the 1st day of April and the 1st day of November. Hence, a notice given on the 21st day of March is insufficient, the owner being entitled to sixty days' notice, independent of the time intervening between the 1st day of April and the 1st day of November; and a supervisor proceeding upon such insufficient notice to remove the fence on the 1st of November, may be enjoined.

From the Tipton Circuit Court.

*G. H. Gifford* and *J. M. Fippen*, for appellant.

*J. A. Swoveland*, for appellees.

OLDS, J.—This was an action by the appellees to restrain the appellant, who is supervisor, from removing a fence on the land of the appellees for the purpose of opening up a highway established by the board of commissioners along the line of appellees' land.

The complaint is in one paragraph. Appellant demurred to the complaint, for want of sufficient facts, which demurrer was overruled and exceptions reserved by appellant.

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Conley v. Grove *et al.*

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He then filed an answer in denial, and the cause was tried by the court without a jury, resulting in a finding and judgment for appellees.

Appellant filed a motion for a new trial, which was overruled and he excepted, and he assigns as errors the overruling of the demurrer to the complaint, and the overruling of the motion for a new trial.

Section 5030, R. S. 1881, provides that "Whenever any public highway shall have been laid out through any inclosed land, the township superintendent shall give the occupant of such land (or the owner, if a resident of the road district) sixty days' notice, in writing, to remove his fence; but such owner or occupant shall not be compelled to remove such fence between the first day of April and the first day of November; and if such fence be not removed pursuant to such notice, such township superintendent shall cause the same to be done."

In the case of *Rutherford v. Davis*, 95 Ind. 245, this section is held to apply to and govern supervisors; so that the section is to be construed the same as if it read "supervisors" instead of "superintendents."

The only question presented as to the insufficiency of the complaint is in regard to the allegation as to the notice.

The complaint contains all the necessary formal allegations as to the appellees being the owners of the land (describing it); the location of the road; that appellant is supervisor, and that he is threatening to, and is about to remove the fence and open up the highway; that the fence is necessary to protect appellees' crops, etc. And then it alleges that such threatened acts of the appellant are unlawful, for the reason that "the plaintiffs, nor either of them, have been notified by said supervisor of his intention to remove said fence, nor of the time the said supervisor intended to open said road; neither has said defendant obtained the consent of these plaintiffs, or either of them, nor the con-

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*Conley v. Grove et al.*

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sent of any authorized person to enter upon said premises and remove said fences, or any part thereof, or do any other act looking toward the opening of said highway." The complaint is clearly bad. The supervisor was not required to give any such notice, as it is alleged in the complaint he had not given. The statute requires the supervisor to give a notice to the occupant, or the owner, if he be a resident of the road district, to remove his fence; the supervisor may have given such a notice as the statute requires, and yet the allegations of the complaint be true.

The case was submitted to the court on an agreed statement of facts. According to the agreed statement of facts the supervisor gave a notice to the appellees in form and manner as required by the statute, and served the same upon them on the 21st day of March, 1887, and it is agreed that the supervisor was threatening and intending to remove the fence on the 1st day of November, 1887.

The statute requires the supervisor to give sixty days' notice in writing to remove the fence, and the statute provides that such owner or occupant shall not be compelled to remove the fence between the 1st day of April and the 1st day of November. The object of the statute is to give sixty days' notice within which time the owner or occupant shall remove his fence, or that he shall have sixty days' notice within which he shall remove his fence, and on failure to do so the supervisor shall remove it; but the owner or occupant shall not be compelled to remove it between April 1st and November 1st.

The effect of the exception is to exclude from the operation of the statute the time between these two dates, and to require notice covering a period of sixty days when the person is required to act; otherwise the notice might be served and the sixty days expire within the period in which the person is not compelled to act, but has the right under the law to allow his fence to remain at the place it occupies, and upon the 1st day of November the supervisor could remove it with-

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*Conley v. Grove et al.*

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out the owner or occupant having any time at which he is required to act to remove his fence.

The notice in this case gave but the remaining days in March in which the appellees were required to act and remove the fence, and they were entitled to sixty days' independent of the time intervening between the 1st day of April and the 1st day of November. The notice was insufficient, and the supervisor had no right under the law to remove the fence at the time he intended doing so.

While the complaint was bad, yet the case was tried upon it, and all the facts agreed upon, and a correct finding and judgment upon the facts as agreed upon. There could be no other finding and judgment except that rendered. No good can be accomplished by reversal of the case, as the same finding and judgment would have to be rendered if the cause was reversed and the complaint amended.

Section 658, R. S. 1881, provides that no judgment shall be "reversed, in whole or in part, \* \* where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." This statute applies with full force in this case, for the parties have agreed upon the facts; there is no dispute, and a proper judgment was rendered.

There is no available error in the record.

Judgment affirmed, with costs.

Filed June 3, 1890.



No. 14,243.

THE CHICAGO AND EASTERN ILLINOIS RAILROAD COM-  
PANY v. MODESITT.

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**SUPREME COURT.**—*Questioning of Answer by Assignment of Error.*—An answer can not be questioned for the first time in the Supreme Court.

**RAILROAD.**—*Injury to Animals.*—*Construction of Cattle-Guards.*—*Opinion Evidence.*—In an action to recover for the value of horses killed on the track of a railroad, the opinion of an expert witness that the construction of a cattle-guard under the track at the place where the horses entered upon it would render the use of the tracks dangerous, is inadmissible.

**SAME.**—*Maintaining Fence.*—*Burden of Proof.*—In such action the burden is upon the defendant to show affirmatively that the place where the animals entered was one that it could not fence without endangering the safety of its employees.

From the Vigo Superior Court.

*W. H. Lyford and L. D. Thomas*, for appellant.

*I. N. Pierce and W. W. Rumsey*, for appellee.

**ELLIOTT, J.**—The appellee seeks to recover the value of three horses killed on the track of the appellant, near the village of Atherton, in Vigo county.

The answer of the appellant was not challenged, in any form, in the trial court, and it can not be successfully assailed here for the first time. The statutory provision permitting a pleading to be questioned by an assignment of errors in this court does not apply to answers.

The appellant offered to prove, by expert witnesses, what would be the effect of putting a cattle-guard under the tracks at the place where the horses entered upon the track, and the court excluded the offered evidence. There was no error in this ruling. The appellant was entitled to prove the condition of the tracks, their location, the use made of them, and like facts, but it was not entitled to the opinion of a witness that the construction of a cattle-guard would make the use of the track dangerous. The ruling of the trial

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The Chicago and Eastern Illinois Railroad Company v. Modesitt.

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court is sustained by the decision in the case of *Indiana, etc., R. W. Co. v. Hale*, 93 Ind. 79. It is also sustained by the general rule that a witness can not express an opinion upon the point which it is the duty of the jury to determine. The case under consideration is not of the same class as the cases of *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Carthage Turnpike Co. v. Andrews*, 102 Ind. 138. In the case of *Indianapolis, Peru, etc., R. W. Co. v. Crandall*, 58 Ind. 365, the evidence offered tended to establish a material fact, and was not a mere expression of opinion. It was for the jury to determine from the facts established by the evidence whether the company was excused from putting in a cattle-guard for the reason that it would make it dangerous to use the track, and it was not a question for opinion evidence.

The case is a close one upon the evidence, and it is probably true that the case made by the appellant is the stronger; but we can not say that there is not evidence sufficient to support the verdict. The burden of showing that the track could not be guarded by cattle-pits, or fences, without endangering the safety of its employees, was on the defendant; for the statute makes no exceptions, but declares, in general terms, that it is the duty of a railroad company to fence its track. The court has, however, so construed the statute as to engraft upon it some exceptions. It was, therefore, incumbent upon the appellant to show affirmatively that the place where the animals entered was one that it could not fence without endangering the safety of its employees. *Pittsburgh, etc., R. W. Co. v. Laufman*, 78 Ind. 319; *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91, and cases cited p. 93; *Evansville, etc., R. R. Co. v. Tipton*, 101 Ind. 197.

The doctrine declared in the case of *Cincinnati, etc., R. R. Co. v. Jones*, 111 Ind. 259, warrants an affirmance of this judgment.

Judgment affirmed.

Filed June 3, 1890.

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 144 595

No. 14,310.

 LEE v. THE BOARD OF COMMISSIONERS OF HUNTINGTON  
 COUNTY.

COUNTY COMMISSIONERS. — Auditor. — *Accounts of.* — *Change in Method of Keeping.* — *Fees can not be Increased.* — County commissioners have no power to add new duties to a public office, and to provide extra compensation therefor, by contract with the officer; and, hence, a county auditor who, under an order of the board, adopts a different method for keeping an account of the various funds, and of making semi-annual settlements, from that prescribed by the Legislature, can not recover compensation for the extra work done.

From the Huntington Circuit Court.

*B. M. Cobb* and *C. W. Watkins*, for appellant.

*J. B. Kenner* and *J. I. Dille*, for appellee.

MITCHELL, J.—The appellant, while auditor of Huntington county, made it appear to the satisfaction of the board of commissioners that it was impracticable for him to make accurate semi-annual settlements with the county treasurer, and a just and equitable distribution of the different funds by the footings of the regular tax duplicate.

The county board thereupon found that there existed an indispensable public necessity, and employed the appellant, as county auditor, to “register, foot and balance all receipts by instalments in a book to be provided for that purpose at the expense of the county, and in consideration of said work being done, it is ordered by the board of commissioners of Huntington county, that the county auditor shall receive the sum of ten (10) cents for each and every entry made on the register of State and county taxes, and five (5) cents for each and every entry made on said register of all gravel road taxes.”

The appellant avers that, relying upon the foregoing order, he made the entries, footings, etc., in a book “that was outside of and in addition to all the books required by law, or

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Lee v. The Board of Commissioners of Huntington County.

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usually kept by the auditor," and he asked to receive payment out of the county treasury of the following account:

"HUNTINGTON COUNTY, INDIANA.

"To EZRA T. LEE, *Dr.*

"To registering, footing and balancing taxes—

For May settlement, 1886 . . . . .	\$611 20
For Nov. settlement, 1886 . . . . .	413 40
For May settlement, 1887 . . . . .	554 75
For Nov. settlement, 1887 . . . . .	172 80

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"Total amount up to date . . . . . \$1,752 15"

Whether the judgment shall be affirmed or reversed depends upon the propriety of the ruling of the court in sustaining a demurrer to the complaint.

The practical question in this, and all other cases of this class, is, was the work for which the public officer asks compensation out of the public treasury, such as is embraced in the general duties of his office, and for which the law provides compensation? If it was, manifestly the commissioners had no power to add to the compensation prescribed by the statute; if it was not, then it is pertinent to inquire whether the county commissioners have power to supplement the provisions made by the Legislature, by adding new duties to a public office, and fixing compensation for the added duties by contract with the officer.

Until it can be shown that county boards are invested with power to supply what may be regarded as defects or deficiencies in the law, by enlarging the duties of county officers, and providing compensation for what may be deemed to be extraordinary services, claims of the character of that in question can receive no countenance from the courts.

In view of the uniform decisions of this court, from its earliest organization until now, and of the prohibitory legislation concerning allowances, which looks in the face of county boards at every turn, it is a matter of surprise that it

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Lee v. The Board of Commissioners of Huntington County.

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should be supposed that an inferior tribunal, possessed of limited jurisdiction, such as is committed to boards of commissioners, was the repository of such general and extraordinary power.

A method of keeping an account of the various funds by county auditors, and of making semi-annual settlements, has been prescribed by the Legislature, and the compensation allowed by law, is, to say the least, not niggardly. Intelligent, conscientious officers ought not to find it difficult to adapt the method prescribed, so as to enable them to keep accurate, intelligent accounts of the various funds, and make correct settlements, as the law requires. If the system prescribed is not the best and most convenient, county boards can well afford to leave the responsibility with the Legislature, until they are specially authorized to correct its supposed defects, rather than attempt the exercise of unauthorized power at an enormous expense to the public.

The doctrine of estoppel is not applicable to a case like the present. The contract was wholly unauthorized and void, and the county received nothing of value under it.

This subject has been so fully and recently considered in *Board, etc., v. Barnes*, 123 Ind. 403, that it is quite enough to say within the principles which controlled that decision the judgment in the present case must be affirmed, with costs.

Filed June 4, 1890.

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The Norwich Union Fire Insurance Society v. Girtton.

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No. 14,300.

124 217  
160 394

THE NORWICH UNION FIRE INSURANCE SOCIETY v.  
GIRTON.

**INSURANCE.—Action on Policy.—Proof of Loss.—Waiver.**—Where an insurance company, after being notified by the insured of the loss, obtains possession of the policy and refuses to pay or adjust the loss, and so notifies the insured, proof of loss is waived by the company, and it is estopped to set up the failure to furnish proof as a breach of the policy.

**SAME.—Compromise.—Fraud.—Settlement must be Rescinded before Suit.**—

Where a compromise is effected on an insurance policy, and a receipt in full executed, and the policy surrendered, while the settlement stands unrescinded, although it may have been obtained by fraud, no action can be maintained on it. The insured must at least rescind, or offer to rescind, and tender back the money received on the contract or settlement, before he can bring his suit.

**INTERROGATORIES TO JURY.—Signature of Foreman.**—Where the general verdict is signed by the foreman, with the word "foreman" affixed to the name, and the interrogatories and answers are signed in the same name, but with the word "foreman" omitted, the objection can not be maintained that the interrogatories and answers are improperly signed.

From the Elkhart Circuit Court.

*J. H. Baker, J. D. Defrees and F. E. Baker, for appellant.*

*H. C. Dodge, for appellee.*

**OLDS, J.**—This was a suit to recover for a loss under an insurance policy, issued to appellee by appellant. There were two items covered by the policy, one of \$500, on a general stock of notions and millinery goods; the other, \$200, on household goods. This suit is for the loss of the notions and millinery goods.

The complaint alleges the destruction of the property by fire, and then it alleges that the plaintiff, the appellee, "had performed all the stipulations and conditions of said policy on his part to be performed, except to furnish proof of said loss to defendant; which proof of loss plaintiff did not furnish because of that, within five days after said loss occur-

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The Norwich Union Fire Insurance Society v. Girton.

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red, said defendant, well knowing said loss, and having been notified thereof by plaintiff without the knowledge or consent of plaintiff, obtained possession of said policy, and notified plaintiff that it, defendant, would not adjust, settle, or pay said loss, or any part thereof, and has ever since said time retained possession of said policy and refused to do anything, or take any steps looking toward ascertaining, adjusting, settling or paying said loss ; and since said obtaining possession of said policy, and refusing to adjust or settle said loss, more than sixty days have elapsed, and therefore plaintiff says that on the 15th day of June, 1885, defendant became indebted to plaintiff in the sum of \$500."

The appellant filed a motion to make the complaint more specific, by requiring the plaintiff to state :

1st. Whether the alleged waiver of proofs of loss was oral, or in writing.

2d. What officer or agent of defendant waived, or undertook to waive, proofs of loss by plaintiff, for that defendant had many officers and agents, and could not, from the complaint, tell what officer, or agent, made the waiver pleaded.

The court overruled the motion, to which ruling appellant excepted, and the question is properly presented, and the ruling is assigned as error.

There was no error in overruling this motion. The complaint alleged that the appellant had been notified by the appellee of the loss, and the appellant took possession of the policy and refused to adjust or pay the loss, and notified appellee that it would not adjust or pay the same ; under this state of facts the appellee had the right to believe that proof of loss was unnecessary, and would be of no avail ; and it was a waiver on the part of the appellant, and it is estopped from setting up such breach of the policy. See 2 Wood Fire Ins. (2d ed.), section 445. *Commercial, etc., Ins. Co. v. State, ex rel.*, 113 Ind. 331 ; *American, etc., Ins. Co. v. Sweetser*, 116 Ind. 370 ; *Aurora Fire, etc., Ins. Co. v. Kranich*, 36 Mich. 289.

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The Norwich Union Fire Insurance Society v. Girton.

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The complaint in this suit declared upon the policy. The appellant filed an answer in five paragraphs. The fifth paragraph avers that after the loss a controversy arose as to the liability of the defendant, and that to compromise and settle all questions of liability, the defendant paid, and plaintiff accepted, \$7 in cash, in consideration of which plaintiff surrendered the policy and released all causes of action arising therefrom, which said release was in writing, and is made a part of said paragraph of answer, and is in the following words and figures :

“ BRISTOL, IND., April 20th, 1885.

“ Received of the Norwich Union Fire Insurance Society of London, England, seven dollars, the same being the original premium on the within policy, which policy is hereby surrendered to said society, and full compromise settlement and all claims for loss or damages forever waived.

(Signed) “ L. H. GIRTON.

Witness:

“ Per C. M. GIRTON.

“ H. H. HOBBS.

“ JOHN H. VIRGIL.”

The appellee replied to the fifth paragraph of answer by a denial under oath, also replied to said paragraph of answer in another paragraph of reply, alleging that at the time of the loss plaintiff was sick, and unable to transact business ; that defendant's agent, Hobbs, proclaimed in the neighborhood that plaintiff set fire to his own property ; that he came with the town marshal to plaintiff's house and threatened plaintiff with arrest unless he would surrender the policy and receipt the same as paid ; that plaintiff was unconscious, and his wife, because of fear for plaintiff's safety, surrendered the policy and signed the receipt set out in the fifth paragraph of answer, and took the \$7 ; that when plaintiff ascertained this he refused to accept, and he never has accepted, said \$7.

There were other paragraphs of answer and reply.

The cause was submitted to a jury for trial, and the jury



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The Norwich Union Fire Insurance Society v. Girton.

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returned a general verdict for the appellee, assessing his damages at \$500, with interest from the time of first suit at six per cent.

At the request of the appellant the court submitted interrogatories to the jury, to be answered in case they agreed upon a general verdict, and the jury returned the interrogatories and answers. It is objected by counsel for appellee that the interrogatories can not be considered, for the reason that they are not properly signed by the foreman. The record shows the interrogatories and answers to have been returned by the jury, and they are signed by John J. McDonald, but the word "foreman" is not added to his name, but his name is properly signed as foreman to the general verdict. This objection we do not think is well taken. It is clearly manifest that the interrogatories were properly submitted to the jury and answered by them, and signed by the foreman.

The interrogatories and answers are as follows:

"1. Did not the defendant, by its agent, pay, on April 20th, 1885, to the wife of the plaintiff, and in his presence and with his knowledge and consent, the sum of seven dollars? Answer. Yes.

"2. Did not the plaintiff's wife, at the request of plaintiff, sign the settlement receipt, or release, which is copied in the fifth paragraph of the defendant's answer? Answer. Yes.

"3. Did not the plaintiff, before the release was written on the policy of insurance, and the money paid therefor, state to defendant's agent that he was able to attend to the business? Answer. Yes.

"4. Were any threats used by the defendant or its agents to induce the plaintiff to accept the seven dollars and execute the release written on the policy? Answer. Yes.

"5. If you say any threats were used by defendant or its agents, state just what the threats were in full. Answer. By threatening to sue for the recovery of the policy on the ground of burning his own goods.

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The Norwich Union Fire Insurance Society v. Girton.

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"6. Was the plaintiff induced or procured to execute the release written on the policy of insurance, and to accept the seven dollars, by any false representations or fraud on the part of the defendant or its agents? Answer. Yes.

"7. If you say in answer to the last question there were false representations or fraud, state every such representation or fraud. Answer. By stating to plaintiff that he had heard people say that he had burned his own stock of goods, and that he was of the same opinion.

"8. Has the plaintiff, at any time before he brought this suit, offered back said seven dollars paid to his wife for him? Answer. No.

"9. Has not the defendant been in the possession of said policy of insurance from the time it was released until the bringing of this suit? Answer. Yes.

"10. Did the plaintiff, at any time before this suit was brought, ever notify the defendant, or any agent of defendant, that he repudiated said settlement and release, and that he rescinded said release and settlement? Answer. No.

"11. Was not the seven dollars paid for said release and settlement used for household expenses of the plaintiff? Answer. Yes."

The appellant moved for a judgment on the answers to interrogatories, notwithstanding the general verdict.

The motion was overruled, and the appellants excepted and the question is properly saved and presented to this court. It is contended by the appellant that the court erred in overruling the motion.

In this ruling there is manifest error. The interrogatories, and answers thereto, show that after the loss the appellant's agent visited the appellee, contending that the appellant was not liable to pay the loss, for the reason that appellee had destroyed his own property, and made a settlement and paid appellee the seven dollars, the amount of premiums appellee had paid upon the policy, or rather paid it to the wife of appellee, by appellee's direction, and by his direc-

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The Norwich Union Fire Insurance Society v. Girtton.

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tion she signed a receipt in settlement for the loss, and surrendered the policy. Though there may have been fraud on the part of the appellant, in obtaining that settlement, while the settlement stands unrescinded, no action can be maintained on the policy. Appellee can not retain the benefit of the compromise and sue on the original contract. He must, at least, rescind, or offer to rescind, and tender back the money received on the contract of settlement before he can bring suit on the policy. He can not ignore the settlement and bring suit on the policy. The case of *Home Ins. Co. v. Howard*, 111 Ind. 544, is very much like the one under consideration. In that case a compromise was made, a release executed, and the policy surrendered in consideration of \$25, and it was claimed that the settlement and release had been procured from the insured while laboring under physical and mental distress, by the false and fraudulent representations of the company's agent. It was held that an action could not be maintained on the policy while the contract of settlement remained unrescinded, though the compromise may have been procured by fraud.

In the case of *Cates v. Bales*, 78 Ind. 285, the same doctrine is enunciated. In this case the money was paid to the wife of the appellee, and the receipt executed by her in the name of the appellee, and he is as much bound by it as if he had received the money and signed the receipt in person.

The appellant also moved for a *venire de novo*, for the reason that the verdict is so defective, uncertain, and ambiguous that no judgment can be rendered thereon, and that the verdict does not assess appellee's damages; which motion was overruled and exceptions reserved, and judgment rendered in favor of appellee for \$542.50. Appellant also moved for a new trial, assigning various reasons, which motion was overruled, and exceptions taken.

As the judgment will have to be reversed for the error in overruling appellant's motion for judgment on the interrogatories, and answers thereto, notwithstanding the general

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Bateman v. Butler *et al.*

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verdict, it is unnecessary to consider the other questions presented.

In the opinion of the court justice will be best subserved by a reversal of the judgment, with instructions to grant a new trial.

Judgment reversed, at costs of appellee, with instructions to the court below to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed June 4, 1890.

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No. 14,116.

## BATEMAN v. BUTLER ET AL.

**CONTRACT.**—*Statute of Frauds.*—*Debt of Another.*—*Promise to Pay as Part Consideration of Property Purchased.*—A party who assumes and agrees to pay a debt of a third person as part payment of the consideration for property purchased does no more than promise to pay his own debt, and hence such promise is not within the statute of frauds.

From the Marion Superior Court.

*W. F. A. Bernhamer* and *W. B. Walls*, for appellant.

*J. E. Florea*, *L. Wallace, Jr.*, and *W. Irvin*, for appellees.

**ELLIOTT, J.**—The questions which require consideration arise on the special verdict. The facts contained in the special verdict, so far as they relate to the issue joined between the appellant and the appellee Thrift, are, in substance, these: In April, 1883, John M. Bateman, his wife, Sarah A. Bateman, and his son, Aden Bateman, lived upon a parcel of land containing about three acres near the town of North Salem, in Hendricks county, belonging to Lindley L. Thrift. There was a flouring mill on the land, and the entire property was purchased by John M. Bateman. The consideration which John M. Bateman agreed to pay was one thousand dollars, part of

124	223
132	272
124	223
135	390
124	223
138	283
124	223
147	684
134	223
148	290

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which was paid in property, and for the unpaid remainder of the purchase-price the purchaser executed two promissory notes for the sum of three hundred dollars each, payable in one and two years after date, respectively. In accordance with the direction of John M. Bateman the deed for the real estate was made in the name of his son Aden, and was delivered to Sarah A. Bateman. The grantee named in the deed executed his promissory notes of the tenor and amount already described to the grantor, and to secure them executed a mortgage conveying the property to the grantor. The deed was not recorded, and Aden Bateman paid no part of the purchase-price of the land, and has not paid the notes executed by him. John M. Bateman continued to reside upon the property, and, with the assistance of his son, conducted and operated the mill and its business. The son remained with his father until January, 1884. During the time he was engaged with his father there was no accounting of profits, no charge for board or services, but all lived together as one family, having as their sole means of support the profits from the business of the mill. Before the notes executed by John M. Bateman for the purchase-money of the property became due, it was agreed that Thrift, the vendor, should convey to Sarah A. Bateman the part of the land on which the mill was located; that he should surrender one of the notes executed to him for the purchase-money; that Sarah A. Bateman, as part of the consideration for the property conveyed to her, should assume and pay the other note, and that Thrift should take possession of the part of the land not occupied by the mill as owner. This agreement was performed by the execution of a conveyance of the mill property to Sarah A. Bateman, and the delivery of possession to Thrift. John M. Bateman continued to manage the mill, and in April, 1884, he procured it to be insured in the name of his wife. Soon after the insurance was obtained he removed from the State. and some time afterwards the mill was destroyed by fire. After his removal the loss was adjusted and the money due

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on the policy placed in the hands of McGilliard and Dark for Sarah A. Bateman, and they were properly brought into court under proceedings in garnishment. All the Batemans are non-residents of Indiana.

We have no doubt that the court did right in giving the appellee Thrift a judgment.

In assuming to pay the note given by her son, Mrs. Bateman simply agreed to pay so much of the purchase-money as equalled in amount the note executed by her son. It has been decided over and over again that such a promise is not within the statute of frauds. *McDill v. Gunn*, 43 Ind. 315; *Josselyn v. Edwards*, 57 Ind. 212; *Windell v. Hudson*, 102 Ind. 521; *Wolke v. Fleming*, 103 Ind. 105; *Turpie v. Lowe*, 114 Ind. 37. A party who assumes and agrees to pay a debt of a third person as part payment of the consideration for property purchased by him, does no more than promise to pay his own debt.

Counsel for the appellant are entirely wrong in asserting that the special verdict finds facts outside of the issues, as the record very clearly shows.

The verdict warranted a judgment in favor of Butler for the reason that it states, in addition to the facts we have mentioned, that John M. Bateman and Aden Bateman purchased of a firm of which Butler is the surviving partner, machinery for the mill as the agent of Sarah A. Bateman, and that the machinery was placed in the mill. If they did buy the machinery as her agent, then the appellee has a right to treat her as the purchaser.

The special verdict shows that a note was executed by John M. Bateman and Aden Bateman at the time the machinery was purchased, but it also explicitly states that the note was not accepted as payment. In the face of the explicit statement that the note was not received as payment it can not be presumed that it was taken in payment.

There are some facts stated which somewhat confuse the

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 Wilhite *et al.* v. Wilhite *et al.*


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verdict as to Butler, but as the question is presented we can not do otherwise than sustain the judgment as to him.

As to the appellee Sowders there is not the slightest question. There was a separate verdict upon his claim, in which facts are stated which show that he was employed as agent by the appellant, and there can be no doubt that he was entitled to recover the reasonable value of his services.

Errors are assigned jointly against all of the appellees, and we have, perhaps, considered more questions than, in strictness, we should do; at all events we have considered all that we can with propriety examine.

Judgment affirmed.

Filed June 4, 1890.

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 No. 14,216.

### WILHITE ET AL. v. WILHITE ET AL.

**JUDGMENT.**—*Action to Set Aside.*—*Infancy.*—*Fraud.*—The plaintiffs in their complaint to set aside for fraud two certain judgments theretofore rendered against them while they were minors, alleged that in an action in which it was averred that the plaintiffs' grantor, to defraud his creditors, had conveyed certain real estate to the plaintiffs, a judgment was taken subjecting said real estate to sale to satisfy a judgment held against such grantor; that no guardian *ad litem* was appointed for them in such suit, or any appearance made by them therein; that the fact of their minority was concealed from the court, etc.; that the purchaser's assignee subsequently brought his action to quiet title; that they were personally served with process; that before the return day of the summons a guardian *ad litem* was appointed for them, now almost twenty years of age, without their knowledge or consent; that in the trial at once had the guardian admitted the averments of the complaint, and judgment was rendered quieting title.

*Held*, that while the action of the court in rendering judgment before the appearance day was irregular, fraud is not shown, it not appearing that by any imposition upon the court it was induced to dispose of the case before the appearance day, or that plaintiffs were prevented from ap-

124	226
151	185
124	226
153	266
124	226
159	591

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pearing to the action upon that day, to which, it will be presumed, they would have been permitted to make an active defence, or otherwise have been able to protect their rights.

From the Montgomery Circuit Court.

*M. E. Clodfelter, T. E. Ballard and E. E. Ballard*, for appellants.

*W. H. Thompson, J. West, J. E. Humphries and G. D. Hurley*, for appellees.

BERKSHIRE, C. J.—The appellants filed their complaint in two paragraphs, to each of which the appellees filed demurrers which the court sustained, and the appellants excepted, and relying upon these exceptions refused to amend their complaint, and judgment was rendered against them for want of a complaint.

The errors assigned are, that the court erred in sustaining demurrers to the paragraphs of complaint.

The paragraphs of complaint are quite lengthy. The substance of the first paragraph is as follows:

On the 14th day of November, 1879, and for a long time theretofore, and ever since, the appellants were the owners of the real estate in the said paragraph described; that until within a few days of the commencement of this action the plaintiffs were minors, and that the transactions and matters of fact complained of all occurred during their minority, and without their knowledge or consent; that on the 14th day of November, 1879, the appellees Fisher Doherty and Alfred G. McLelland filed in said court their complaint against the appellants and others, to subject the said real estate to the payment of a debt of about \$200, therein alleged to be due to them from one James H. Wilhite; that it was alleged in said complaint that the said James H. Wilhite had purchased the said real estate, paid the full consideration therefor, and to defraud his creditors had caused the same to be conveyed to the appellants; that on the 7th day of October, 1880, the appellants were called to answer to said action, and



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failing to appear were defaulted ; and upon the same day the said complaint was taken by the court as confessed, and a judgment rendered against them that said conveyance was fraudulent as against the plaintiffs in said action, and a decree entered ordering the sale of said real estate ; that the record fails to show that the appellants were ever present in court in person, or by counsel, and in no way discloses that the appellants were infants ; that the appellants were not in court at any time during the pendency of said trial ; that no *guardian ad litem* was appointed for them, and no person appeared for them in any capacity ; that said judgment and decree were rendered on said default without evidence ; that when said complaint was filed and said default taken the said Fisher Doherty, Alfred G. McLelland, and Harvey T. Wilhite, well knew that the appellants were minors, under fifteen years of age, and concealed that fact from the court in order that said judgment might be obtained by default ; that at the time said complaint was filed, said default taken, and said judgment rendered, the appellants had a good and valid defence to said action ; that they were the owners in fee of said real estate, having purchased the same and paid full value therefor ; that said James H. Wilhite did not have any interest therein ; that said real estate was not conveyed to the appellants for the purpose of defrauding creditors, and that some of the material allegations in the complaint were true, as against the appellants ; that afterwards, and on the 13th day of April, 1881, pursuant to a certified copy of said judgment and decree, the sheriff of said county of Montgomery, sold said real estate to the judgment plaintiffs in said action for the exact amount of the judgment rendered on the said alleged indebtedness, and the costs accruing in said action ; that afterwards, and before the year of redemption expired, the said purchasers assigned their sheriff's certificate to the appellee Harvey T. Wilhite, and when the year of redemption expired he obtained a sheriff's deed for said real estate ; that, on the 10th day of September, 1885,

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the appellee Harvey T. Wilhite filed in said court his complaint against the appellants and others to quiet his alleged title to said real estate ; that at said time the only right or title held by him was such as he derived from said sheriff's sale and deed ; that, at the time of filing said complaint, by endorsement thereon, the summons was made returnable September 22d, 1885 ; that the clerk of said court issued said summons on said 10th day of September, returnable on said 22d day of September, and on the 12th day of said month of September the said summons was served on the appellants by reading, and on the 15th day of said month, without the knowledge or consent of the appellants, the court appointed W. S. Moffett, Esq., guardian *ad litem* for the appellants, and immediately following his appointment said Moffett filed an answer in general denial of the complaint, and agreed that said cause might then and there be tried by the court, and admitted in open court that the allegations of the complaint were true, and that the appellants had no title or interest in or to said real estate, or any portion thereof, and it was then agreed in open court between the appellee Wilhite and the said Moffett, that the finding of the court and judgment should be in favor of the said appellee ; that thereupon, on said 15th day of September, 1885, the said court, in pursuance of said admissions and agreement made by said Moffett and the said appellee, did enter of record a finding for said appellee as upon a trial, and did render judgment in accordance with its finding, and quieting the title of the said appellee in and to the said real estate as against the appellants ; that the records of said court disclose that said summons was issued on the 10th day of September, and made returnable on the 22d day of said month ; that the summons was served on the appellants on September 12th, and on the 15th day thereof the court appointed a guardian *ad litem* for the appellants, and the trial had on the same day ; that the said record does not disclose that the appellants did not personally appear in said court and consent to

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*Wilhite et al. v. Wilhite et al.*

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the appointment of said guardian *ad litem*, or that they were not present at said time, and does not disclose that said admissions and agreement were made upon which the court found for the said appellee, and on which final judgment was rendered for him; that in truth and in fact the appellants did not appear in court and consent to the appointment of said guardian *ad litem*, and were not present at any time prior thereto.

The second paragraph of the complaint is the same as the first, except that it alleges that the appellants had no notice whatever of the first action.

It is well settled by many decisions of this court that a judgment may be impeached on the ground of fraud.

A proceeding instituted to set aside a judgment because of fraud in its obtainment is regarded as a direct, and not as a collateral, attack upon it. *Wainright v. Smith*, 117 Ind. 414; *Overton v. Rogers*, 99 Ind. 595; *Hogg v. Link*, 90 Ind. 346; *Earle v. Earle*, 91 Ind. 27; *Duringer v. Moschino*, 93 Ind. 495.

Conceding, but not deciding, that the facts alleged in either paragraph of the complaint as to the first action and judgment referred to therein are sufficient to taint the judgment with fraud, and that but for the second suit and the judgment thereon rendered, the paragraphs of complaint would be good, if there was no fraud in the proceedings and judgment in the second action, then the paragraphs are not good on the ground of fraud.

In an action brought by a person to impeach a judgment taken against him while an infant because of an alleged fraud, as a circumstance to be considered with other circumstances, the age of such person at the time the judgment was taken ought to be considered.

What might be a fraud upon an infant in its cradle might not be so against a full grown man, lacking but a few days or weeks of freedom from his disability.

According to what appears in the record the appellants

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were nearly twenty years of age when the appellee Wilhite commenced his action to quiet title, and for all that is made to appear in the record, were as capable of looking after their rights and interests as they were one year later when they commenced the present action.

It is alleged that they were personally served with process. It is true that the averments in the complaint disclose the fact that the appellants were not summoned to appear until the 22d day of September, and that the court appointed a guardian *ad litem*, and heard the case and gave judgment on the 15th day of said month, and that the appellants were not in court on that day, nor on any day prior thereto; but for all that is averred in the complaint they may have been in court on the next day, and because of the presumption which always prevails in favor of good faith and honesty, we must presume that they were there on the day they were summoned to appear, in obedience to the command of the summons.

If there was an averment that they were not present during the term, and were kept away as the result of some wrongful act of the appellee Wilhite, the case would present a different phase.

The appellee had the right to commence his action against the appellants to quiet his title to the real estate, notwithstanding they were minors; the court had jurisdiction of the subject-matter, and of the parties.

So far as we are informed, the appellants were not prevented from appearing to the action and protecting their rights.

It does not appear that the court was in any way imposed upon whereby it was induced to take up the case in advance of the return day and dispose of it.

No doubt if the appellants had gone into court on the 22d day of September and called the attention of the court to the fact that the proceedings taken by the court were premature, and that they desired to make an active defence to the ac-

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tion, the opportunity so to do would have been afforded them ; if not they could have had the record in such a condition as to have taken an appeal to this court, which would have been successful.

But this they did not do, and for their failure no excuse is offered ; and if their rights have been prejudiced they may attribute it to their own negligence, and in such cases equity affords no relief.

The proceedings of the court in taking steps in the action, and giving judgment in advance of the return day of the summons, were irregular, and it may have been such an error that in a direct proceeding would have reversed the judgment ; but when the question of fraud is eliminated from the complaint its further allegations are, in their character, but a collateral attack upon the judgment and proceedings in the action of the appellee Wilhite, in which he sought to have his title to the real estate in question quieted ; and it is too well settled to require the citation of authorities that the courts will not entertain collateral attacks on judgments which, at most, are only erroneous.

Although the return day of the summons had not arrived, and the appellants were, therefore, not bound to appear when the court heard the case and gave judgment, yet the summons had been issued, some notice had been given, and it was sufficient to enable the court to decide the question of jurisdiction over the person, and if it decided the question wrong its decision was erroneous, but not void, and can not be attacked collaterally. See *Essig v. Lower*, 120 Ind. 239, and cases cited.

We find no error in the record.

Judgment affirmed with costs.

Filed June 4, 1890.

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Dowden, Administrator, v. Wood *et al.*

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No. 15,255.

## DOWDEN, ADMINISTRATOR, v. WOOD ET AL.

**PROMISSORY NOTE.—Consideration.—Parol Evidence to Show.—Pleading.—**

*Answer.—Sufficiency of.*—A husband and wife wishing to procure a home applied to the uncle of the wife, a bachelor, who was on intimate terms with them, and from whom he had received many kindnesses, for money with which to make the cash payment. He first gave them one thousand dollars, which was applied as a cash payment on the land, two notes for seven hundred and fifty dollars each being given for the remainder of the purchase-money; and afterwards he gave them fifteen hundred dollars more with which to purchase said notes. It was agreed with the donor, when the money was delivered, that the principal should never be repaid, but that the donor should be paid an annuity equal to the interest on the sums donated during his natural life. To secure this promise on the part of the husband and wife a note for one thousand dollars was executed to the donor, and the notes purchased were also assigned to him. All the notes were secured by mortgages on the land. An action was brought on the notes by the administrator after the donor's death, and the facts as above were stated in the answer as a defence.

*Held*, that the answer states a good defence to the action; and as the money advanced did not constitute the consideration of the note, that evidence to prove the averments in the answer, such evidence going to the consideration of the notes, was admissible, and was not a violation of the rule prohibiting the admission of parol evidence to contradict a written instrument.

From the Dearborn Circuit Court.

*W. S. Holman, W. S. Holman, Jr., N. S. Givan and M. J. Givan*, for appellant.

*H. D. McMullen, W. R. Johnson and J. K. Thompson*, for appellees.

**COFFEY, J.**—The complaint in this case consists of two paragraphs. The first is based upon a promissory note executed by the appellees to Otho W. Dowden for one thousand dollars, dated March 23d, 1882, and seeks to foreclose a mortgage on certain real estate executed to secure the payment of said note.

The second is based upon two promissory notes of seven

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Dowden, Administrator, v. Wood *et al.*

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hundred and fifty dollars each, executed by the appellees to Levi R. Morrill on the 25th day of March, 1882, and assigned by Morrill to the said Otho W. Dowden. This paragraph, also, seeks to foreclose a mortgage executed by the appellees on certain real estate to the said Morrill to secure the payment of said notes.

The appellees answered, substantially, that at the time of the execution of said several notes and mortgages the appellee America Wood was the wife of her co-defendant George Wood, and that she was the niece of Otho W. Dowden, deceased; that Dowden was a bachelor, and at the time of his death was sixty-eight years of age; that at the time of the execution of said note and mortgages he had no home, lodged in the upper story of his business house in the city of Lawrenceburgh, and took his meals elsewhere, and had no one to look after his comfort and welfare; that he was the owner of property of the value of fifty thousand dollars, while the appellees were dependent upon their daily labor for support; that the home of appellees at the time of the execution of said notes and mortgages, and at all times up to the death of said Dowden, was open to him, and that he, when sick or feeling indisposed, came to the home of the appellees, and was by them kept, administered to, boarded and cared for, and that he went to no other place or relatives for care or attention; that appellees, desiring to purchase the property described in said mortgages to the said Morrill, applied to the said Dowden for money with which to make the down payment, when he advanced to them, for that purpose, one thousand dollars, the same being the one thousand dollars evidenced by the note in suit for that amount; that at the time they received said money, and at the time said note was executed therefor, it was agreed and understood by the appellees and the said Dowden that there should be a note executed for said one thousand dollars, but that the principal should never be paid, but that the interest should be paid during the life of the said Dowden, and that said

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note was only given so that the interest thereon might be collected; that they invested said one thousand dollars in the down payment on said real estate, and executed the other notes in suit for the deferred payments on the same; that shortly thereafter the said Dowden agreed to and did furnish the money to appellees to purchase said two seven hundred and fifty dollar notes; that at the time it was agreed that said money should never be repaid to said Dowden, but that the appellees should pay to him, annually, an amount equal to seven per cent. thereon during his life, and that these appellees should purchase said notes and have the same assigned to the said Dowden; that they did purchase said notes with said money, and afterwards delivered the same to the said Dowden to secure to him the payment of said seven per cent. during his lifetime; that after the purchase of said real estate they continued to live in the house thereon, and to pay the said Dowden the said stipulated sums per annum up to the time of his death, during which time he made the house of the appellees his home for months at a time, especially when indisposed or sick, and appellees continued to care for and board him, and made no charge and received no pay therefor.

The court overruled a demurrer to this answer, and appellant excepted.

Upon issues formed the cause was tried by the court without the intervention of a jury. The court made a finding in favor of the appellant for the sum of two hundred and ninety-one dollars, and, over a motion for a new trial, rendered judgment thereon.

The errors assigned are:

*First.* That the court erred in overruling the appellant's demurrer to appellees' answer to the complaint.

*Second.* That the court erred in overruling the appellant's motion for a new trial.

It is contended by the appellant that the answer above referred to attempts to contradict the terms of the notes in suit,



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Dowden, Administrator, v. Wood *et al.*

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and is for that reason bad on demurrer. On the other hand it is contended by the appellees that said answer does not attempt to contradict the notes in suit, but attempts to show upon what consideration they were executed.

It is a rule too familiar to require the citation of authorities, that a written contract can not be added to, contradicted, or varied, by parol testimony. It is equally well settled on the other hand, that you may in all cases show the consideration upon which a promissory note was executed, unless the consideration is expressed in the note and made contractual. The cases relied upon by the appellant are *Denman v. McMahan*, 37 Ind. 241, and *McDonald v. Elfes*, 61 Ind. 279.

In the case of *Denman v. McMahan*, *supra*, the father had loaned the son a sum of money, and had taken a promissory note to secure its repayment. Subsequently the father promised the son to give him the note, but had never delivered it. It will be seen by this statement that there was no question in the case as to the consideration upon which the note was executed.

In the case of *McDonald v. Elfes*, *supra*, the payee of the note then involved was the widow of Daniel J. McDonald, deceased. The note was executed to her by the maker in consideration of the assets of the estate of her late husband, and, notwithstanding it was executed upon that consideration, the maker of the note attempted to allege a verbal agreement, entered into at the time of its execution, by the terms of which it was never to be paid. It was properly held that to permit him to do so would be to allow him to contradict the express terms of the note.

We do not understand the facts in the case at bar as falling within the rule announced in either of the above cases. This case, as we understand the facts, falls within the rule laid down in the cases of *Sherman v. Sherman*, 3 Ind. 337; *Norman v. Norman*, 11 Ind. 288; *Peabody v. Peabody*, 59 Ind. 556, and *Daugherty v. Rogers*, 119 Ind. 254.

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Dowden, Administrator, v. Wood *et al.*

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Under the rule as enunciated in these cases the money advanced does not constitute the consideration of the note, and it is competent to inquire into the whole transaction between the parties with a view of ascertaining their real intentions. *Colt v. McConnell*, 116 Ind. 249. In this case it appears that it was not the intention of Otho Dowden to make a loan of money to the appellees, but it was his intention to make a gift. With that intention in view the money was delivered. This perfected the gift intended, and the appellees were under no obligation, either legally or morally, to return the money. But it was agreed on the part of the appellees that in consideration of the kindness of Otho Dowden in thus aiding them to procure a home they would pay him an annuity equal to the interest on the sum donated to them during his natural life. For the purpose of securing that promise on the part of the appellees, the one thousand-dollar note was executed, and the two seven hundred and fifty dollar notes were assigned to Dowden. It will thus be seen that the money advanced by Otho Dowden does not constitute the consideration of any of the notes in suit. As to whether the notes would be enforced to the extent of the annuity agreed upon we need not decide, as no such question is presented for our consideration.

This class of cases is to be distinguished from the cases where the note was executed to secure the return of money advanced. In the latter cases if the payee of the note desires to make a gift of the sum secured to the maker of the note, it is necessary that the note should be surrendered in order to perfect the gift. It is not so in the class we are now considering.

In our opinion the answer before us states a good defence to the cause of action set up in the complaint, and the court did not err in overruling a demurrer thereto.

It follows, from what we have said, that the court did not err in overruling the objections of the appellant to evidence tending to prove the averments contained in the answer.

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Miller v. Cook.

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Such evidence went to the consideration of the notes in suit, and did not violate the rule prohibiting the admission of parol evidence to contradict a written instrument.

The evidence tends strongly to sustain the finding and judgment of the trial court.

There is no error in the record.

Judgment affirmed.

Filed June 4, 1890.

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No. 14,984.

**MILLER v. COOK.**

**NEW TRIAL.**—*Newly Discovered Evidence.*—*Slander.*—In an action for slander, a new trial should not be granted the defendant on the ground of newly-discovered evidence where the evidence alleged to have been discovered is of an act of unchastity committed long after the slanderous words were published.

**SAME.**—Newly discovered evidence, to authorize a new trial, should be of such a character as to render it probable that a second trial would result differently from the first.

From the Pike Circuit Court.

*E. A. Ely*, for appellant.

*F. B. Posey*, *A. N. Taylor* and *E. P. Richardson*, for appellee.

**ELLIOTT, J.**—In the case between the same parties, growing out of the same transaction, we have given an outline of the controversy, and we need only add that the present appeal is prosecuted from a judgment denying a new trial asked upon a complaint filed after the close of the term at which the original judgment was rendered. The ground upon which a new trial is claimed is that the appellant, since the trial, has discovered evidence that the appellee had sexual intercourse with a man named Clark.

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Kennedy v. The State, *ex rel.* Dorsett, Drainage Commissioner.

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Waiving a decision of the question whether the appellant could prosecute a complaint for a new trial and an appeal at the same time, we affirm the judgment below for the reason that the trial court justly ruled that the facts stated do not show that the appellant was entitled to a new trial.

The judgment of the trial court is right for these reasons:

1st. The act of sexual intercourse, which it is alleged that the appellant could prove, occurred long after the slanderous words were published.

2d. The evidence is not such as renders it probable that a second trial would result differently from the first.

The questions raised upon what counsel say is a complaint to review are disposed of by the judgment in the case first brought to this court.

Judgment affirmed.

Filed June 5, 1890.

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No. 14,324.

KENNEDY v. THE STATE, EX REL. DORSETT, DRAINAGE  
COMMISSIONER.

**DRAINAGE.—Assessments.—Drainage Commissioner's Notice.**—Where an assessment for the construction of a ditch has been approved and confirmed by the court, the failure of the drainage commissioner to give notice "as soon as may be" after he was appointed, as required by section 5, act 1883, can not be set up in bar of an action against one of the original parties to the proceeding. The assessment as approved and confirmed by the court constitutes a lien on the land assessed at the date of filing the petition, except where lands are omitted in the petition and afterwards assessed and reported by the commissioners.

**SAME.—Pleading.—Complaint.—Jurisdiction.**—In such action, where the complaint alleges the filing of the petition, the giving of notice, the reference to the commissioners of drainage, and the approval of their report, the jurisdiction by the court of the subject-matter is sufficiently

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- shown although the verification of the original petition in the drainage proceeding is not alleged.

From the Morgan Circuit Court.

*J. H. Jordan* and *O. Matthews*, for appellant.

*G. W. Grubbs* and *M. H. Parks*, for appellee.

OLDS, J.—This was an action by the appellee against the appellant to collect an assessment made against the lands of the appellant for the construction of a ditch under the act of 1881, as amended by the act of 1883.

The complaint is in one paragraph. Appellant demurred to the complaint for want of facts, which demurrer was overruled, and exceptions reserved. The cause was then put at issue and a trial had by the court without a jury, and, on proper request, the court found the facts and stated its conclusions of law.

The appellant excepted to each of the conclusions of law. The appellee moved for judgment on the special findings and conclusions of law. The court sustained the motion, to which ruling the appellant excepted.

The appellant assigns as error the overruling of his demurrer to the complaint, that the court erred in its conclusions of law, and that the court erred in rendering judgment in favor of the appellee upon its findings and conclusions of law.

The complaint is of considerable length, and we do not deem it necessary to set it out. The complaint is clearly sufficient. It is based upon the report of the drainage commissioners as approved and confirmed by the court, and a copy of such assessment so approved and confirmed by the court is set out with the complaint.

It is contended that it appears by the complaint that the drainage commissioner, charged with the construction of the work, did not make out the notice as required by section 5 of the act of 1883, "as soon as may be after" he was appointed, as required by said section, but that such notice was

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not made out until long thereafter, and that it is not in the form of a notice. Even if the contention be true, it can make no difference. The appellant was one of the original parties to the proceedings, whose lands were assessed, and no rights of innocent parties have intervened. Under the act of 1883 it is the assessment as approved and confirmed by the court that constitutes and becomes a lien on the land so assessed from the date of filing the petition, except where lands are omitted in the petition and afterwards assessed and reported by the commissioners.

It is contended that the complaint does not aver that the original petition in the drainage proceedings was verified, and therefore it does not appear that the court had jurisdiction in such proceedings.

The complaint sets out with particularity the steps taken, the filing of the petition, the giving of the notice, that the court referred the same to the commissioners of drainage, and that they reported, and their report was approved and confirmed by the court. It is fully shown by the complaint that the court had jurisdiction of the subject-matter, and took jurisdiction in the case, and it shows the proceedings to be valid as against a collateral attack. *Wishmier v. State, ex rel.*, 110 Ind. 523; *Pickering v. State, etc.*, 106 Ind. 228; *McMullen v. State, ex rel.*, 105 Ind. 334; *Deegan v. State, etc.*, 108 Ind. 155; *Johnson v. State, etc.*, 116 Ind. 374; *State, ex rel., v. Jackson*, 118 Ind. 553.

The questions presented by the other assignment of errors are not materially different from those presented by the demurrer to the complaint.

There is no error in the record.

Judgment affirmed, with costs.

Filed June 5, 1890.

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The Board of Commissioners of Montgomery County v. Ristine, Adm'r.

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No. 14,194.

THE BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY  
v. RISTINE, ADMINISTRATOR.

COUNTY COMMISSIONERS.—*County Asylum.—Insane Person.—Contract for Care and Support.—Invalidity of.—Quantum Meruit.*—A contract made by the board of county commissioners with a guardian for the care and support of his insane ward in the county asylum at an agreed price to be paid out of the ward's estate, is invalid, and no recovery can be had thereon against the ward's estate, nor can there be a recovery by the county on the *quantum meruit*. A person who is admitted into a county asylum, organized for the support of the poor, can not be charged therefor, either on an express or implied contract. *BERKSHIRE, C. J., and OLDS, J., dissent.*

From the Montgomery Circuit Court.

*J. H. Burford*, for appellant.

*P. S. Kennedy, S. C. Kennedy, T. H. Ristine and H. H. Ristine*, for appellee.

MITCHELL, J.—In the year 1873 John W. Hulett was adjudged a person of unsound mind, incapable of managing his estate, and was accordingly placed under guardianship by order of the circuit court of Montgomery county. At the September term, 1874, the guardian appeared before the board of commissioners of the county and represented that his ward was possessed of an estate amply sufficient to pay for his board and care, and that as guardian he was willing to enter into an agreement with the county board to pay three dollars a week for the board and care of his ward. It was thereupon agreed between the board and the guardian, that the insane ward should be received into the county asylum for the poor, to be boarded and cared for under the supervision of the superintendent of the asylum at the price of three dollars per week, and an order was made upon the commissioners' record accordingly. The ward died in 1887, leaving an estate valued at \$3,000. The board of commissioners thereupon filed a claim against his estate, in which

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they set out the foregoing order and agreement, and alleged that the board had fully complied with its agreement, and that there remained due the county something over four hundred dollars on account of board and care furnished the decedent. By way of inducement it is alleged that the insane ward was wholly incapable of taking care of himself, that he was dangerous and indecent in his habits, that the guardian had no suitable or safe place in which to confine him, that he had been unable, after repeated efforts, to procure anyone to take charge of and care for him, and that he thereupon made application to the board of commissioners, as above, to have him admitted into the county asylum, where a suitable place had been prepared to keep and take care of such persons as he was.

The question is whether or not the board of commissioners was entitled to recover for what remained unpaid at the death of the ward, either upon the contract specially pleaded, or for the value of the board and necessities furnished as upon an implied promise to pay.

The facts as presented make it apparent that the person against whose estate this claim is being prosecuted was insane and dangerous to the community, within the meaning of the statute.

One whose insanity is of such a character as to lead him to make indecent exposure of his person in public, and who, on that account, becomes a constant menace to public morality and decency, is as certainly dangerous to the community, if suffered to remain at large, as is one who threatens physical injury to others. The statute (sections 5142 to 5150, R. S. 1881) makes provision whereby such persons may be restrained under the order of the circuit court at the public expense. Provision is also made whereby the public treasury may be reimbursed out of the estate of a person dangerously insane, in case he be possessed of an estate.

This statute looks to the protection of the public from those whose insanity makes them dangerous to the commu-



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nity. It has in it no feature of charity to the individual, nor was it enacted with a view to benevolence. If proceedings had been taken under this statute, and the person adjudged insane and dangerous to the community had become a charge upon the public treasury, it would have been within the power of the county commissioners, by the very terms of the statute, to collect the charges out of the estate of the insane person. Section 5147, R. S. 1881. No regard was paid to the above statute. The constitution provides for the establishment and support of certain benevolent institutions, and confers power upon county boards "to provide farms as an asylum for those persons who, by reason of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society." Section 3, article 9, Constitution.

The Legislature, in devising a charitable scheme for the care and support of the poor, enacted that "Every county should relieve and support all poor and indigent persons lawfully settled therein," and that it should be lawful for county commissioners to purchase a tract of land, and to build, establish, and organize an asylum for the poor, and employ some humane and responsible person to take charge of them. Sections 6069, 6090, R. S. 1881. The statute provides that all poor persons who have become permanent charges on the county may be received into and supported in the county asylum, and the county commissioners are authorized to assess a tax for the support of the poor and for the establishment and maintenance of an asylum; but we find no authority for a county board to admit any one into the county asylum by contract, or to receive pay for the care and support of any one admitted into the institution. The organization and maintenance of county asylums for the poor, and the care and support of those who are admitted into them, is a part of a scheme of unmixed public charity and benevolence which was inaugurated under the express sanction of the Constitution.

An institution organized for the avowed purpose of be-

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stowing or administering charity, unless specially authorized by its charter to do so, can not contract to bestow what purports to be a benefaction for a price, or to dispense charity for pay. The statute nowhere authorizes county commissioners to enter into contracts for the care and support of persons in the asylums organized for the care and support of the poor; nor is there any implication that persons who are admitted into those asylums can be so admitted by contract with the county commissioners.

In *Board, etc., v. Hildebrand*, 1 Ind. 555, it was held that the provision made by law for the support of the poor was purely charitable, and that a husband could not be held liable for board, lodging and support furnished in the county asylum to his wife. Again, in *Board, etc., v. Schmoke*, 51 Ind. 416, it was held that a contract made by the husband of an insane wife with a board of commissioners for her support in the county asylum was invalid, and that no recovery could be had by the county, even though it had performed the contract. The case first cited was decided in 1849, before the adoption of the present Constitution. The doctrine distinctly enunciated in that case was that county commissioners had no power to convert an institution that was intended as a public charity into a boarding-house for such as wished accommodation for themselves or for their relatives for pay. A convention to revise our Constitution, and more than twenty successive Legislatures, have met and adjourned since that decision was promulgated, and all have accepted it as a correct exposition of the spirit and purpose of the Constitution and laws under which provision has been made for the relief of the poor. All the existing laws in relation to those asylums have either been enacted or re-enacted since the decisions above mentioned were promulgated, and yet there is nowhere, even by implication, any power conferred upon county boards to admit persons of any degree or station into a county asylum for pay or by contract. More than forty years ago this court declared, in effect, that these institutions were organized for

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purely charitable and benevolent purposes, that the work done in them was to be the part of the public in the great labor of love for the unfortunate, that was to be done without money and without price, and the Legislature, the immediate representative of the people, during all this time has accepted the decisions of this court as correct interpretations of the spirit and purpose of the Constitution and laws.

After this great lapse of time we are asked to overturn these decisions thus acquiesced in, so as to authorize an institution, that has all this time been regarded as a noble public charity, to be converted, in part, at least, into a house of private entertainment, by contract with the county commissioners. If county commissioners may make a contract with the guardian of an insane ward, or the husband of an insane wife, to care for and board the ward or wife, they may enter into contracts with guardians of minor children to have them boarded at the asylum for the poor at an agreed price, or they may enter into contracts with husbands whose wives are not insane for a like purpose. When it is thought advisable to change the policy of the State, so as to authorize county asylums to be converted into places for confining and keeping insane persons by contract, or for boarding those who are not agreeable to other members of the family, the change ought to be made by the Legislature, and not by the courts.

Our conclusion is that the contract relied on was unauthorized, and beyond the power of the county commissioners, and that no recovery can be had thereon. Nor can there be any recovery upon the *quantum meruit*, as upon an implied contract or promise.

It is a thoroughly settled proposition that where one is received into a charitable institution for support or treatment, the law raises no implied obligation to pay in the absence of a contract. Where an individual is received into an institution established solely for benevolent purposes, the law refers his reception, and the relief administered to him,

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The Board of Commissioners of Montgomery County v. Ristine, Adm'r.

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to motives of charity, unless the charter or by-laws of the society or institution provide that compensation may and shall be charged. An institution or society, no more than an individual, can assume to be dispensing charity and at the same time create a pecuniary obligation against one to whose necessities it ministers. The wayfaring man who fell among thieves may have been rich as Dives, but he came under no implied obligation to reimburse the Good Samaritan, who set an example of charity by pouring oil and wine into his wounds and by lodging him at an inn at his own expense. Services which were intended to be gratuitous at the time they were rendered can not afterwards be used as the basis of an implied promise to pay. *Ramsey v. Ramsey*, 121 Ind. 215 (222).

In *St. Joseph's Orphan Society v. Wolpert*, 80 Ky. 86, it appeared that a charitable institution, organized for the purpose of educating and maintaining orphan children, sought to recover from a guardian the value of raising and maintaining his wards, the children of a deceased soldier. The wards had been received by the society with the avowed purpose of bestowing upon them an education as a matter of charity. Learning afterwards that the guardian had in his hands a considerable sum of money which had been paid him by the United States government as pension money, the society brought suit. It was held that the society having been created for charitable and benevolent purposes, it could not recover for board, care and education of orphans, whose control it had taken with the avowed purpose of bestowing charity.

County asylums, having, as we have seen, been organized for purposes of charity and benevolence only, the commissioners having no power to admit persons by contract for pay, the law will not raise an implied obligation or promise on the part of one admitted to pay for the value of his board and support. The law will imply that he was admitted through motives of charity. We are aware that there are

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The Board of Commissioners of Montgomery County v. Bistine, Adm'r.

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decisions in some of the States that seem to hold a contrary view. Courts in other States, however, hold to the views enunciated by this court in the cases cited. Our opinion is that the subject is not now open to the courts of this State for further examination, until the Legislature shall have intervened. Whether an overseer of the poor, who has furnished temporary relief to a wife or child, wrongfully deserted by a husband or parent, can recover from the person in default upon an implied or constructive promise, we do not inquire. What we hold is that a person who is admitted into a county asylum, organized for the support of the poor, can not be charged therefor either upon an express or implied contract.

The judgment is affirmed, with costs.

Filed June 5, 1890.

#### DISSENTING OPINION.

BERKSHIRE, C. J., and OLDS, J.—We are compelled to dissent from the opinion of the court, and briefly state some of the reasons which lead us to a different conclusion.

Conceding that under the law the contract alleged in the appellant's complaint was one which it had no legal right to make, it does not follow that the appellant might not enforce it or recover upon a *quantum meruit*.

The guardian of the decedent might, under the circumstances, enter into such a contract, and after his ward was taken into the county asylum and cared for pursuant to the contract, it did not lie in his mouth during the lifetime of the decedent, nor of his administrator thereafter, to deny the authority of the appellant to enter into the contract.

It appears that the parties all acted in good faith, and in the light of the circumstances, that which was done was for the best, not only for the decedent but for the public.

The decedent was an insane person, and his condition was such that the public good, as well as his own benefit, required that he be confined. He had an ample estate to com-

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The Board of Commissioners of Montgomery County v. Ristine, Adm'r.

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pensate those who might care for him, but no private person could be found prepared and willing to assume the burden and responsibility.

The appellant was so situated that it could take the decedent to its poor asylum and give him proper care and attention without in any way abridging the rights or privileges of others supported at said institution. Under such circumstances we can imagine no satisfactory reason why the appellant should not be reimbursed. Every element of an estoppel is present. The opinion of the court in the main rests upon two former cases decided by this court. *Board, etc., v. Hildebrand*, 1 Ind. 555; *Board, etc., v. Schmoke*, 51 Ind. 416.

The last of these cases was decided by a divided court, two out of five of the judges dissenting.

Not only are we of the opinion that these cases are not sound in principle, but we find them to be out of line with the great weight of authority. See *Howard v. Trustees, etc.*, 10 Ohio, 365; *Trustees, etc., v. Demott*, 13 Ohio, 104; *Inhabitants, etc., v. Turner*, 14 Mass. 227; *Jasper County v. Osborn*, 59 Iowa, 208; *Inhabitants, etc., v. Stratton*, 128 Mass. 137; *City of Bangor v. Inhabitants, etc.*, 71 Maine, 535; *Town of Dakota v. Town of Winneconne*, 55 Wis. 522; *Directors, etc., v. Manlany*, 64 Pa. St. 144; *Turner v. Hadden*, 62 Barb. 480; *Wertz v. Blair County*, 66 Pa. St. 18; 2 Kent, 148; *Commissioners, etc., v. Directors, etc.*, 7 Ohio St. 65; *Goodale v. Lawrence*, 88 N. Y. 513; *Inhabitants, etc., v. Lyons*, 131 Mass. 328.

In our opinion the judgment ought to be reversed.

Filed June 5, 1890.

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Ex Parte Cottingham, Guardian.

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No. 15,537.

## EX PARTE COTTINGHAM, GUARDIAN.

GUARDIAN AND WARD.—*Report and Inventory.—Citation of Court.—Notice.*

—Upon the failure of a guardian to comply with an order of the court requiring him to make a report and file an inventory *instantly*, a citation was issued commanding him to do so within three days, but after the citation was issued there was a delay of twelve days before any further action was taken by the court; and at the end of that time, the guardian having disregarded the order of the court, his successor was appointed.

*Held*, that it can not be objected by the guardian that the notice was insufficient. A guardian is required by the statute (section 2521, R. S. 1881) to file an inventory of his ward's estate within three months after his appointment, and upon his failure to do so the court may summarily remove him and appoint his successor.

From the Hamilton Circuit Court.

W. Garver, for appellant.

BERKSHIRE, C. J.—The record in this case is very imperfect, but we gather from it the following facts:

The appellant's ward is an insane person. The court ordered the appellant, on the 7th day of February, 1890, to make a report showing the condition of the accounts between himself and his trust, and also ordered him to make and file an inventory showing the amount of the receipts from the real estate of the said ward. The order was that the report be made *instantly*. The appellant failed to comply with the order made by the court, and on the 12th day of said month of February a citation was ordered to issue, commanding the appellant to report as to the condition of his accounts with his trust, and to make an inventory on or before the 15th day of said month; that on the day the citation was ordered it was issued, and on the same day duly served by reading to the appellant; that, on the 24th day of said month of February, the appellant having failed to comply with the said last named order of the court, it removed him from his

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Ex Parte Cottingham, Guardian.

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trust and thereafter appointed his successor, and it is from the said order of removal that this appeal is prosecuted.

The appellant contends that he was entitled to ten days' notice, and an opportunity to be heard thereafter.

Conceding, for the present, that the position of the appellant is correct, still there was no error in the ruling and judgment of the court.

The citation, when served, was notice to the appellant that the court desired a report and inventory from him; the court thereafter delayed twelve days before taking further action, notwithstanding the order required the appellant to make his report and inventory within three days.

The appellant totally and entirely disregarded the order of the court. After receiving the citation he should have responded thereto, and if he had any legal cause for not complying with the court's order it was his duty to properly present it to the court, and if not, then to report and file an inventory as commanded. But we are of the opinion that the appellant was not entitled to notice as contended. The court had the power to remove the appellant under the circumstances of the case without notice.

The law made it the duty of the appellant to file an inventory of his ward's estate within three months after his appointment, and upon a failure so to do it became the duty of the court to summarily remove him and appoint his successor. Clause 1, section 2521, R. S. 1881; section 2521, R. S. 1881; *Kimmel v. Kimmel*, 48 Ind. 203.

The record fails to show that an inventory had been filed; the court was insisting that one should be filed. In view of the appellant's ability to show the fact if an inventory had been filed, and his failure so to do, we must in this *ex parte* proceeding presume, in support of the court's action, that none had been filed; and, for the same reason, presume that a report was due from the appellant.

It is the duty of the courts to look closely after the es-



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tates of infants and insane persons under guardianship, and from all that we can understand from the record before us we think the court was acting with commendable vigilance.

In our opinion there is no merit in this appeal.

Judgment affirmed, with costs.

Filed June 5, 1890.

No. 14,377.

## BRONSON v. DUNN ET AL.

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126	75
124	252
130	213
124	252
141	692

INTOXICATING LIQUOR.—*Applicant for License.—Answers to Interrogatories.—*

*Verdict.*—Where it appears from the answers to interrogatories that the applicant for license while previously engaged in the liquor business had sold to persons in the habit of becoming intoxicated; that he did not keep an orderly house, and is not a fit person to be intrusted with the sale of intoxicating liquors, he is not entitled to a judgment on such answers.

*SAME.—Erroneous Instruction.—Reversal of Judgment.*—An instruction ascribing to intoxicating liquors qualities not known to exist as a matter of law, but which may exist as a matter of fact, is erroneous; but such instruction will not lead to a reversal of the judgment refusing a license to an applicant who is shown by facts disconnected from the subject upon which the instruction was given to be a person not fit to be intrusted with a license.

From the Hamilton Circuit Court.

*W. Booth and C. D. Potter*, for appellant.

*J. R. Gray and R. Collins*, for appellees.

COFFEY, J.—This was an application made by the appellant before the board of county commissioners to obtain a license to retail intoxicating liquors.

The cause was appealed to the circuit court, where it was tried by a jury, resulting in a verdict and judgment against the appellant. With the general verdict the jury returned answers to interrogatories.

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Bronson v. Dunn *et al.*

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From the judgment of the circuit court the appellant appeals to this court, and assigns as error :

*First.* That the circuit court erred in overruling the motion of the appellant for judgment in his favor notwithstanding the general verdict.

*Second.* That the circuit court erred in overruling the motion of the appellant for a new trial.

It appears from the answers to interrogatories returned by the jury, that the appellant, prior to his present application, had been engaged in the business of retailing intoxicating liquors ; that while so engaged he sold to persons in the habit of becoming intoxicated ; that he did not keep an orderly house, as required by law, and was incapable of keeping such a house, and that he is not a fit person to be intrusted with the sale of intoxicating liquors.

With these facts appearing upon the face of the answers to the interrogatories, we do not think the court erred in overruling appellant's motion for judgment in his favor on said answers notwithstanding the general verdict against him.

It is also argued by the appellant that the court erred in giving to the jury instructions numbers one, two and three.

Instructions one and three state the law correctly, and there was no error in giving them to the jury.

Instruction number two is erroneous in ascribing to intoxicating liquor qualities which we do not know to exist as matter of law, but which may exist as a matter of fact. It is the province of the court, in its instructions to the jury, to state the law of the case, and the questions of fact should be left to the jury. But as the qualities of intoxicating liquor were not a question involved in the issues, we are unable to say that the judgment should be reversed for the error above named in view of the fact that the judgment is right on the facts, as developed by the answers to interrogatories, independent of the question to which the instruction relates.

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Section 658, R. S. 1881, provides that no judgment shall "be stayed or reversed, in whole or in part, \* \* \* where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

There is evidence in the record tending to support the general verdict, and the answers returned by the jury to the interrogatories.

That the appellant, when intrusted with the license, sold to persons in the habit of becoming intoxicated, and failed to keep an orderly house, were facts sufficient to authorize the refusal of his present application, and they are facts wholly disconnected from the subject upon which the erroneous instruction was given. We are of the opinion, therefore, that the judgment should not be reversed on account of the giving of the instruction of which complaint is made.

Judgment affirmed.

Filed June 5, 1890.

No. 12,521.

THE CITY OF LOGANSPORT ET AL. v. CASE.

**TAX SALE.—Execution of Deed.—Injunction.—Tender.—Pleading.**—In an action to enjoin the execution of a deed to the purchaser at a tax sale on account of irregularities in the sale which render it ineffectual to convey title, a paragraph of complaint which alleges that a tender was made of the amount due, but fails to allege that the tender was brought into court for the benefit of the purchaser, is bad.

**SAME.—Purchaser's Lien.—Void Sale.**—A tax sale, although made in violation of mandatory provisions of the statute, vests in the purchaser the lien of the State upon the land upon which the taxes were leviable, in all cases except where the sale was void because the land sold was not liable to taxation, or where the taxes had been paid, or the description of the land was so imperfect as to fail to identify the land, or where the sale was made without authority of law.

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194	244
196	333
124	254
128	342
129	68
194	254
131	152
131	156
132	11
133	101
133	130
124	254
143	82

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**SAME.**—*Sale Ineffectual to Convey Title, but Carrying Lien of State.—Redemption by Delinquent Taxpayer.—Statute.*—Where a tax sale is ineffectual to convey title, but carries to the purchaser the lien of the State (Section 6488, R. S. 1881), the delinquent taxpayer can redeem from such sale only upon the conditions prescribed by section 6466, R. S. 1881, relating to redemption from tax sales. MITCHELL, C. J., dissents.

From the Cass Circuit Court.

*J. C. Blacklidge, W. E. Blacklidge, B. C. Moon, J. C. Nelson and Q. A. Myers*, for appellants.

*D. P. Baldwin*, for appellee.

**BERKSHIRE, J.**—The appellee, who was the plaintiff below, filed her complaint, originally, in one paragraph, and afterwards, with the permission of the court, added two additional paragraphs.

Pending the trial, the second paragraph was dismissed by the appellee.

By the first and third paragraphs the appellee seeks to enjoin the treasurer and clerk of the city of Logansport from executing to the purchaser a deed to certain real estate for which the appellant Millikan holds a certificate of purchase under a sale for delinquent taxes claimed to be due and owing to said city from former owners of the said real estate, and a cancellation of the certificate is demanded.

The appellants filed demurrers to the said paragraphs of complaint, which were overruled by the court, and they excepted.

In the first paragraph certain irregularities are alleged which are sufficient to render the sale ineffectual to convey title to the purchaser, but there is nothing averred to bring the case within section 6487, R. S. 1881, which was the statute in force when the sale was made, nor to bring it within section 1, p. 95, Acts 1883. (See Elliott's Supp., section 2142).

It is conceded, in this paragraph, that the sale carried with it the sum for which the sale was made, together with lawful interest, and also transferred the lien of the State to

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the purchaser; and it is averred that a tender of \$501.60 was made to the city treasurer in payment of the amount due.

There is no averment in the paragraph that the tender is brought into court for the benefit of the purchaser. For this reason, if for no other, this paragraph of the complaint is bad.

The third paragraph, in its prefatory averments, is very similar to the first paragraph, and alleges a tender to the treasurer of the city of Logansport of \$501.60 for the use of the purchaser at the tax sale, and in the absence of an averment that the amount tendered is brought into court for the use of the purchaser, thus keeping the tender good, it avers that the amount which the appellee should pay can not be ascertained except as it may be fixed by the court, and asks the court to ascertain and fix the amount, and offers to pay the amount so ascertained, and when the amount is ascertained and paid, demands a cancellation of the purchaser's certificate, and a permanent injunction enjoining the city officers from executing a deed.

The amount of the certificate was known to the appellee when she commenced her suit, and had she brought that sum, together with the additional sum which she admitted she ought to pay into court for the purchaser, and in her complaint so informed the court, all objection on this ground to the complaint would have been obviated; but this she did not do, and the paragraph offers no sufficient excuse for her failure so to do. This renders the complaint bad. See *Morrison v. Jacoby*, 114 Ind. 84, and cases cited.

The appellants filed an answer in two paragraphs, the first being the general denial.

The second paragraph was stricken out by the court on motion of the appellee, but as this ruling of the court is not material to our conclusion we need not notice it further.

The cause being at issue was submitted to the court for trial, but before the court announced its finding the appellee

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brought into court for the use of the appellant Millikan the sum of \$535.

The court thereafter found that the sale represented by said certificate was void, but that the said Millikan was entitled to said sum of \$535, and afterwards rendered judgment declaring the said tax sale void ; that the appellee was the owner of said real estate, and that she recover of the appellant Millikan her costs and charges in the action laid out and expended.

It was further ordered by the court that the said sum of \$535, less the costs, be paid to the said Millikan on condition that he execute to the clerk a receipt for the same.

This judgment is a little unusual, to say the least of it. The appellant Millikan filed a motion to modify the judgment, but as the judgment must be reversed we need spend no time in considering this motion.

The appellant Millikan filed a motion for a new trial, which motion the court overruled, and he excepted. He then filed a motion to tax costs, which was overruled, and he excepted, but we need not consider the motion, in view of the conclusion to which we have come.

It is unimportant whether the rights of the parties are to be determined under the law as it stands since the amendment to section 6437, R. S. 1881, by the act of March 5th, 1883, or as it stood before the amendment.

Section 6487, before the amendment, related entirely to sales ineffectual to transfer the lien of the State to the purchaser, and the section as amended relates to sales of the same character. The only difference in the section as it originally stood and as amended, is that the amended section contains the following words not included in the original : " Or if the sale or attempted sale is made without authority of law." These words refer to sales that do not fall within the scope or purview of the statute, and not sales contemplated by the statute ; but in the proceedings something is

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omitted which the law requires, or something which is required is not done in the manner prescribed.

It is not contended that the sale under consideration was not one contemplated by the statute, nor that the treasurer and clerk of the city had no power under the law to make the sale, but the contention is that they did not proceed in the manner which the statute prescribed.

As the sale was one contemplated by the statute, and one which the officers making it were empowered to make, and as the real estate was subject to taxation, and the tax had not been paid, and the description not so imperfect as to be ineffectual to transfer the lien of the State, it was not a sale falling within said section 6487, as it originally stood, nor within its provisions as amended.

It was a sale falling within the provisions of section 6488, R. S. 1881, and carried to the purchaser the taxes, interest, penalty, and costs, together with the lien of the State, and included all the benefits given by the statute to purchasers at such sales to induce them to purchase. Said section 6488 reads thus :

"If any conveyance for taxes shall prove to be invalid and ineffectual to convey title because the description is insufficient, or for any other cause than the first two enumerated in the preceding section, the lien which the State has on such lands shall be transferred to and vested in the grantee, his heirs and assigns, who shall be entitled to recover from the owner of such land the amount of taxes, interest, and penalty legally due thereon at the time of sale, with interest, together with the amount of all subsequent taxes paid, with interest; and such lands shall be bound for the payment thereof."

Under sales of the character provided in section 6487, *supra*, the purchaser acquires no legal or equitable claim against the taxpayer or his property; he must look for reimbursement to the city or county causing the sale to be made. But if the sale is one which falls within section

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6488, *supra*, the purchaser has no claim against the county or city, but has his lien against the real estate. *State, ex rel., v. Casteel*, 110 Ind. 174; *Morrison v. Jacoby, supra*. When the statutes under consideration were passed the General Assembly was well informed as to the invalidity of tax sales as a means of conveying title, and that in all the cases brought to this court involving the validity of tax titles, not one had been found effectual to convey title. Knowing, as we do, that the Legislature was thus informed it would be a violent presumption on our part to presume that section 6466, R. S. 1881, was only intended to apply to sales effectual to convey title, and especially when to do so would remove all inducement to persons to become purchasers at tax sales, and when it appears all through the act that one of the chief objects that the Legislature had in view was to hold out inducements to purchasers. To so construe the statute would be to place the Legislature in the false attitude of making provision for a class of sales that only existed in the imagination, and leaving practically unprovided for all sales that would be—all save the few falling within section 6487, *supra*, and thus giving no encouragement to purchasers, the contrary of which was the evident purpose of the Legislature. The more reasonable conclusion is that the General Assembly took a practical, common-sense view of the situation, and had in mind the worthlessness of tax sales as a means of conveying title to real estate sold, and the large delinquent lists in the different counties throughout the State, and undertook to provide a remedy whereby the revenues of the State could be the more promptly and effectually collected. With this end in view the present laws were enacted, and all sales classified into two classes: Sales absolutely void, and sales valid for all purposes except to convey title, and for that purpose ineffectual. In construing the different sections of the statute for the collection and assessment of taxes the court can not ignore but must regard the classification which the Legislature has made as to



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tax sales. If we regard and keep in mind the classification made by the General Assembly we need have no difficulty in ascertaining and determining the rights of a purchaser at a tax sale, including the remedies which the law affords him; and the rights and remedies of the land-owner are made equally clear.

If the sale is one which falls within section 6487, *supra*, the purchaser must ask the county or city, as the case may be, to refund him his money, with six per cent. interest; but if the sale is valid, but ineffectual to convey title, there must be a redemption under the provisions of section 6466, *supra*, within two years after the sale, or the purchaser is entitled to a deed.

If this court should declare, in the face of the statute, that if when the sale is made the taxpayer has personal property out of which the tax could have been levied, that that renders the sale of his real estate void, it would be to recognize a class of sales not known to the statute, and leave the purchaser remediless except so far as equity might subrogate him to the rights of the State. And if we would be justified in holding a tax sale void because of the fact that the State had a lien on personal property of the taxpayer, then it would be equally our duty to hold such sale void for any other infirmity appearing in the proceedings leading up to and into the sale as made, and thus by judicial legislation we practically strike from the statute sections 6466 and 6488, *supra*. But we think this court has virtually settled the questions here involved. In *Morrison v. Jacoby*, *supra*, ELLIOTT, J., speaking for the court, said: "Lands of the appellees were sold for taxes and bought by the appellant Morrison. Certificates were issued to him by the proper officer. From these sales the appellees seek relief in this suit. Their complaint shows that the sales were ineffectual to convey title, but it does not show that the lands were not subject to taxation, nor that the description was not sufficient to identify the land, nor that the taxes had been paid. The relief

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prayed is an injunction against the appellants, restraining the officers from executing a deed to Morrison on the certificate issued to him. \* \* \* An illegal sale may be avoided and the acquisition of title prevented where there are irregularities in the proceedings of the officers ; but the avoidance of the sale for such cause, or for similar causes, does not destroy the lien of the State, to which the purchaser is subrogated. A sale may be totally ineffectual to convey title and yet carry the lien. The only causes which will so completely impair the efficacy of a sale as to destroy the lien are those specifically enumerated in the statute. The policy of the law is to compel the payment of taxes, and to attain this end, penalties are imposed upon the citizens who fail to pay their taxes as the law requires. It is obvious that if no penalty were attached there would be no compulsion, and revenues essential to the conduct of the government could not be collected. Recognizing this principle, we have in many cases held that, although a sale may not be sufficient to carry title, it will nevertheless be sufficient to carry a lien, and with it the right to the *penalty provided by law.*"

We pause here to inquire what is the penalty provided by law? The answer must be, where the taxpayer seeks to remove the lien from his property, at any time after the sale, before the expiration of the two years (when the purchaser is entitled to a deed), the purchase-money named in the certificate, the costs of the sale, and ten per centum in addition where the redemption takes place within six months from the day of the sale ; if, after six months, and within one year, the purchase-money, costs of sale and fifteen per centum ; if, after one year, and within two years, the purchase-money, costs of the sale, and twenty-five per centum addition, as provided in section 6466, *supra*.

The statute will be examined in vain for any other provision which meets the case ; and from the number of times that the court in the case above refers to the said section, it

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is evident it had its provisions in mind when referring to the lien and penalty provided by law.

We may add further, right here, as a circumstance tending strongly to support our conclusion, that the law, in fixing the rights of the parties after the tax deed is executed, recognizes no difference in sales not absolutely void by virtue of the provisions of the statute.

In *St. Clair v. McClure*, 111 Ind. 467, this court said, through NIBLACK, J.: "In the recent case of *State, ex rel, v. Casteel*, 110 Ind. 174, it was, upon full consideration and a careful review of our decided cases, held that, under section 6487, R. S. 1881, when construed in connection with other provisions relating to the same subject, there were only *three contingencies* in which the sale of lands for delinquent taxes is absolutely void—that is to say, ineffectual for any purpose—the first being where the lands shall not have been liable to taxation; the second where the taxes have been paid before the sale; and the third where the description on the tax-duplicate is so imperfect as to fail to identify the land. It was further held that under the succeeding section (6488), the lien which the State has on the lands so sold, is, in *all other cases*, transferred to, and vested in, the purchaser, his heirs or assigns; and that, in case the sale fails to convey title, the amount paid by the purchaser may be recovered back by the enforcement of his acquired lien against the lands. *These holdings led us to the very natural conclusion that no sale of lands for taxes due, which transfers to, and vests the lien of the State in, the purchaser, can properly be treated as, or adjudged to be, a void sale, and to that conclusion we still adhere.*"

In *Scott v. Millikan*, 104 Ind. 75 (79), ZOLLARS, J., delivering the opinion of the court, it is said: "It has been held, and properly so, that these statutes do not authorize the purchaser at a tax sale to institute proceedings and enforce such a lien and recover the *increased penalties* during the two years allowed for redemption, but that in an action by the

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land-owner, even before the expiration of the two years, the purchaser will be protected." The court further said in that case: "The purpose of these statutes is to facilitate the collection of taxes by *inflicting* penalties upon the delinquent owner, and holding out a *reward* to the purchaser."

The foregoing passages are quoted in *Morrison v. Jacoby*, *supra*, with approval. But in the last named case the court goes on to say: "*The provisions of the statute are in themselves quite clear. The act of 1881, with much particularity, provides on what terms land may be redeemed before a deed is executed, graduating the penalty according to the length of time the taxpayer suffers his land to remain unredeemed. R. S. 1881, section 6466.*"

In view of the case which the court had before it, which was an action to enjoin the execution of a deed, as is the case now under consideration, what did the court mean in the employment of the language just quoted, if in a case where the sale was ineffectual to convey title, but carried to the purchaser the lien of the State, it did not mean to be understood as holding that there must be a redemption from the sale provided in section 6466?

The language would have been meaningless as well as inappropriate; but in view of the conclusion to which the court arrived, the language is clear, forcible and appropriate to the questions the court had under consideration. But the court goes on to say: "It can not, therefore, be doubted that the policy of our revenue laws is to induce purchasers to buy at tax sales, and to compel the citizens to pay their taxes. For this reason reward is offered the purchaser and a penalty visited on the delinquent citizen. In furtherance of this general policy, the Legislature provided for the security of the purchasers by enacting that if the title failed they should have a lien for *taxes, interest, penalties and costs.*" But we quote further from the opinion in this case, as indicating the mind of the court as to what are the rights of purchasers at

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tax sales where the lien is carried to the purchaser but the sale ineffectual to convey title to the real estate: "Our conclusion on this branch of the case is, that the statutes, since 1872, secure to the purchaser at a tax sale, not void for the reasons expressly enumerated in the statute, a lien upon the land upon which the taxes were leviable. This lien, as is evident from the statutes and from our decisions, vests in the purchaser holding under a certificate. R. S. 1881, section 6466; 1 R. S. 1876, p. 124; Acts of 1883, p. 96. If there were any doubt on the general provisions it is dispelled by the clause which reads thus: 'In case the party purchasing the land, or his assigns, fail to take a tax deed for the land so purchased, within six months after the expiration of the two years, no interest shall be charged or collected from the redemptioner after that time.' Section 6466, *supra*. It is a familiar rule of statutory construction, that no word or clause of a statute shall be deemed meaningless if it can be possibly avoided, and this clause would be meaningless if only purchasers holding under a deed were entitled to the benefit of the general statutory provisions."

As we have already said, this case covers the whole ground and decides the questions which we have considered. The reasoning and conclusion of the court are well supported by former decisions of this court therein cited and by cases not cited, and are certainly in accord with the letter and spirit of the statute and the evident intention of the Legislature.

Our conclusion is that as the appellee did not offer to redeem from the sale upon the terms required by said section 6466, the court erred in overruling the motion for a new trial. The case of *Michigan Mutual L. Ins. Co. v. Kroh*, 102 Ind. 515, cited by counsel for the appellee, is virtually overruled as to the terms upon which the lien of the State, in a case like the one here involved, may be removed from the real estate of the delinquent land-owner, by the

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cases of *Morrison v. Jacoby, supra*, and *St. Clair v. McLane, supra*.

The judgment is reversed, with costs.

Filed April 5, 1890; petition for a rehearing overruled June 6, 1890.

## DISSENTING OPINION.

MITCHELL, C. J.—The judgment of the court seems to be predicated upon the following propositions: 1. A tax sale, although made in disregard of the most peremptory requirements of the statute, is, nevertheless, not invalid and void, unless the land sold was not liable to taxation, or unless the taxes had been paid, or the description of the land was so imperfect as to fail to describe the property with reasonable certainty, or where the sale was made without authority of law, which is interpreted to mean, where the officer had no power to make the sale. 2. A tax sale, although made in violation of mandatory provisions of the statute, unless the sale was invalid for the reasons assigned above, nevertheless immediately vests in the purchaser the lien which the statute imposed in favor of the State upon the property of the taxpayer. 3. The only manner in which a delinquent taxpayer whose property has been thus sold, although he may immediately or within two years thereafter tender the amount of the taxes, penalties and interest, prescribed in section 6488, R. S. 1881, can remove the cloud cast upon his property by an illegal and unwarranted tax sale, is by submitting to the conditions prescribed or interest enjoined by section 6466, R. S. 1881, and by redeeming his property precisely as if the sale had been in all respects regular and legal.

Without in any manner controverting the validity of the first two propositions, the following reasons and authorities are submitted in justification of this dissent and non-concurrence with the opinion of the court as respects the proposition last stated. That an attempt by a public officer to sell the property of an individual, in violation of law, should,

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or by any possibility could, impose upon the owner the necessity of redeeming, or buying back his property, as if it had been lawfully sold, or taken by due process of law, is a proposition which, it is submitted with great deference to the opinion of the court, can not be supported, either in reason or upon authority. An intention to require that this should be done is nowhere to be found in the statute, and if it were, the question would then arise whether or not it was within the power of the Legislature to enact that one whose property had been sold, or subjected to an onerous burden, without due process of law, could be required to accept the alternative of redeeming from an illegal sale, upon oppressive terms, or of losing his property as though it had been sold in conformity to law. That the State may compel the delinquent taxpayer to reimburse the purchaser who has discharged the obligation of the land-owner, and who through the fault of public officers acquired nothing in return, is abundantly settled, but whether a penalty or increased burden can be imposed upon the land of the taxpayer without due process of law, or as a result of an illegal sale, is quite another question.

As is said by an eminent authority, "The Legislature can have no more authority to compel a land-owner to pay a lawless exaction to a third person than it has to compel a like payment to the State directly. The one as much as the other would be robbery." *Cooley Taxation*, 553.

Any conclusion, therefore, which rests upon the assumption that the Legislature must have anticipated that revenue officers would violate or disregard the law, and make illegal tax sales, and that the statute providing for redemption from tax sales must on that account be applied to all sales indiscriminately, illegal and legal alike, can not be well founded.

As was said by CHURCH, Ch. J., in *Trowbridge v. Horan*, 78 N. Y. 439, an intention can not be imputed to the Legislature to visit penalties upon the citizens for not paying the tax upon an irregular assessment. So we say courts can

not ascribe to the Legislature an intention to compel citizens whose property might be sold in violation of law, either to lose it or submit to onerous penalties in redeeming it from invalid or ineffectual sales. In the language of COOLEY, J., "Penalties can not be imposed in respect of the non-payment of taxes which the Legislature assumes are irregular and authorizes the correction of." *Cooley Taxation*, 305, note. For the same reason redemption in the statutory sense can not be predicated upon an illegal sale. It is altogether unnecessary, however, to inquire what the Legislature had, or had not, the power to do in respect to redemptions from illegal sales, since it seems abundantly clear that no attempt was made to require the owner of property thus sold to make a statutory redemption.

It is settled law that a purchaser at a tax sale either gets the title to the land sold or he gets nothing unless the statute makes provision for his security or reimbursement. Thus it is said: "The purchaser at a tax sale therefore either gets a title to the land subject to the statutory redemption, or he gets nothing. If he receives a deed which for any reason is subject to a fatal infirmity, he will lose what he has paid. This is the rule unless the statute shall recognize an equity in him and provide for it. Sometimes the statute does this by making a provision for the refunding of his money from the public treasury. But sometimes also statutes give him a lien upon the land." *Cooley Taxation*, 546.

Statutes which make provision for redemption by the owner relate to one subject, while those which recognize the equity of the purchaser, and make provision for his security in cases of illegal tax sales, relate to an entirely different and distinct subject.

It would be idle to enact statutes providing for redemption from sales that are ineffectual to convey title. In such a case the land-owner has lost nothing to redeem. The purchaser is the one whose equity needs protection, and statutes appropriate to that end have been enacted.



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No correct conclusion can possibly be reached by confounding statutes which provide for the land-owner with those which make provision for the purchaser. Those relating to redemption rest upon the assumption that the land of the delinquent taxpayer has been sold, and make provision for its redemption, or re-purchase, by the former owner. Those which make provision for refunding, or securing, the repayment of money paid by a purchaser at a tax sale presuppose an invalid or ineffectual sale, in consequence of which the State obtained the purchase-money for which the tax purchaser got nothing in return, out of which arise the propriety and equity of reimbursing or affording him adequate means of reimbursement for money paid into the public treasury. In the one case a valid sale has occurred, and the purchaser has acquired a right, or title, to the land sold, subject to the right of a statutory redemption by the owner. In the other the sale is invalid, or ineffectual; the title to the land is wholly unaffected, but the purchaser having paid his money into the public treasury, and discharged the obligation of the delinquent taxpayer to the State, the State in turn recognizes the equity of the purchaser, and transfers to him the lien which it had on the defaulting taxpayer's land. The purchaser thereafter, until a deed is made as provided by law, is placed in the same relation to the delinquent taxpayer which the State occupied before the sale. His rights are neither more nor less, as we shall see by the authorities later on, than those which the State would have possessed had no sale occurred.

Section 6466, proceeding upon the assumption that land of the delinquent taxpayer has been regularly sold, makes provision whereby he may redeem by paying to the purchaser the amount of the purchase-money, with interest calculated at a very high rate. The purpose of this exaction is twofold. It operates as a penalty upon the delinquent owner, tending to insure greater promptness on his part in discharging his obligation to the State; and, on the other hand, it

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stands as an inducement to purchasers to make profitable investments. These considerations are to be understood, as we quote from a learned author, "as referring only to the case of redemption from a *valid* tax sale. If the sale was void, it may be set aside at the owner's suit without redemption. But in that case the rights of the tax purchaser and the amount he is entitled to receive will depend upon a different class of statutes." Black Tax Titles, section 185. This statement is nothing more than the recognition of the difference remarked upon by all the text-writers between statutes which make provision for redemption and those which provide for the reimbursement of the purchaser at an ineffectual tax sale. It is pertinent, therefore, to inquire what provision has been made for the security of those who purchase real estate at a tax sale which is so far invalid as to be ineffectual to convey the title to the purchaser. Section 6488, R. S. 1881, which with the preceding sections relating to invalid tax sales, has been in force, without substantial modification, since 1853, provides, in substance, that if any conveyance of land sold for taxes shall prove invalid or ineffectual to convey title for any cause, except that the land was not subject to taxation, or that the taxes had been paid, the lien which the State has shall be transferred to and vested in the purchaser, "who shall be entitled to recover from the owner of such land the amount of taxes, interest, and penalty legally due thereon at the time of the sale, with interest, together with the amount of all subsequent taxes paid, with interest; and such lands shall be bound for the payment thereof." This statute expresses the right of the purchaser at an invalid tax sale, and the liability of the delinquent taxpayer can by no possibility be greater than the right conferred by statute upon the purchaser. The two are co-existent and co-extensive, and can not logically be construed otherwise. The effect of an invalid tax sale by force of this section is to invest the purchaser with the lien of the State, and to clearly and specifically define the measure of

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his rights and the extent of his remedy. In doing this it also fixes the liability of the taxpayer, because the rights and liability of both are wholly statutory.

Statutes similar in import have been enacted and are in force in most of the States, and their construction by courts has been singularly uniform and without discord until now. The construction thus given has uniformly been in accord with the decision of this court in *Michigan Mutual L. Ins. Co. v. Kroh*, 102 Ind. 515, as it is believed the authorities which follow abundantly demonstrate.

In *Gage v. Pirtle*, 124 Ill. 502, the Supreme Court having under consideration a statute regulating the reimbursement of purchasers at invalid tax sales substantially like our own, in a case where land had been sold at a tax sale without giving the notice required by the statute of the State of Illinois, after summarizing the provisions of the statute relating to redemptions from tax sales, which is also similar to that in force here, said: "These are the amounts, it is claimed, which were required to be paid here by the above proviso of the statute of 1885. We do not think so. It would not seem reasonable to require the land-owner to pay such amount in order to have set aside a tax deed upon his land which had been wrongfully obtained. It would be equitable that he should refund to the tax sale purchaser the amount paid upon the purchase, and all taxes, charged upon the land, paid by the latter, with interest, and we think that is all that the statute requires to be paid." The statute of Illinois secured to the purchaser at an invalid tax sale "all taxes and legal costs, together with all penalties, as provided by law," as it shall appear the purchaser or his assigns properly paid. Section 6488, R. S. 1881, secures to such a person "the amount of taxes, interest, and penalty legally due thereon at the time of sale, with interest, together with the amount of all subsequent taxes paid, with interest." The statutes are therefore not distinguishable.

The same question was before the same court in *Gage v.*

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*Waterman*, 121 Ill. 115. The court, after refuting the contention that the statute relating to redemptions determined the right of the parties, said: "It has been held by repeated decisions of this court, that the rule of allowing the amount paid at the sale, and also all subsequently paid taxes and assessments, together with interest thereon, is the proper one. *Barrett v. Cline*, 60 Ill. 207; *Phelps v. Harding*, 87 Ill. 442; *Smith v. Hutchinson*, 108 Ill. 662."

As stated in the head-note, the same court held in another case, that a bill may be maintained to cancel an invalid tax title and certificate of purchase, but the complainant will be required to pay the purchase-money at the tax sale, and all subsequent taxes paid, with six per cent. interest. *Barrett v. Cline*, *supra*.

In *Alexander v. Merrick*, 121 Ill. 606, the same rule was enunciated. The precise question here involved came before the Supreme Court of Nebraska in *Dillon v. Merrian*, 22 Neb. 151, decided in 1887. That case arose out of the fact that real estate had been sold while the taxpayer owned available personal property. The decision is based upon the statutes regulating redemption from tax sales, and providing for the security of the purchaser in cases of sales ineffectual to transfer title similar in effect to our own. Delivering the judgment of the court, MAXWELL, C. J., said: "The defendant contends that she is entitled to forty per cent. per annum interest on the amount of taxes paid until the time to redeem expired. In *Pettit v. Black*, 8 Neb. 52, it was held that where the sale of the land was invalid the tax purchaser would be subrogated to the rights of the county. In effect, there was no valid sale. The purchaser therefore simply acquires the lien possessed by the county, which would entitle him to interest at the rate of one per cent. per month. *Lynam v. Anderson*, 9 Neb. 367; *Jones v. Duras*, 14 Neb. 40. There having been no valid sale of the land the tax purchaser is subrogated merely to the rights of the county, and is not entitled to the rate of interest claimed."

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In *Barke v. Early*, 72 Iowa, 273, the rule, as established by numerous decisions of the Supreme Court of Iowa, is reiterated to this effect: In an action to set aside a sale for taxes, for failure to comply with a provision of the code, the plaintiff was properly required to pay the amounts for which the lands were sold, with the penalty and interest thereon, the same as if there had been no sale, and the plaintiff was paying the delinquent taxes to the county. BECK, J., pronouncing the judgment of the court, said: "The doctrine recognized by this court appears to be this: Where the tax is valid and enforceable against the land, and the sale is void or voidable, the tax, with penalties, may be recovered by the purchaser at the sale, in an action against the owner. \* \* \* These rules are supported by the following reasons: In case the land may be sold for the taxes, the taxpayer stands in the position of a delinquent whose land is subject to tax sale. He ought in that case to be liable as a delinquent for the interest and penalties which the statute prescribed shall be paid after delinquency. The purchaser takes the place of the county by his purchase." See *Besore v. Dosh*, 43 Iowa, 211; *Miller v. Corbin*, 46 Iowa, 150; *Everett v. Beebe*, 37 Iowa, 452; *Early v. Whittingham*, 43 Iowa, 162; *Roberts v. Merrill*, 60 Iowa, 166.

In *Fix v. Dierker*, 30 La. Ann. 175, the rule in the State of Louisiana, as summarized in the head-note, is declared substantially in the following language: A tax sale made without notice is void, and the amount paid by the purchaser, with interest, must be restored to him by the owner before the cloud can be removed from his land. *Hickman v. Dawson*, 35 La. Ann. 1086.

In *Hart v. Smith*, 44 Wis. 213, an action to have a tax certificate cancelled, it was held, where the tax was invalid on account of irregularities which did not go to the ground work of the tax, that the owner, as a condition of obtaining relief, must pay the amount of taxes fairly and justly assessed, with interest, together with the costs of the suit.

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See *Cogburn v. Hunt*, 57 Miss. 681; *Stetson v. Freeman*, 36 Kan. 608. Decisions to the same effect as those above might be cited from many other States, all of which fall in a straight line with each other and with the ruling of the learned court below. Nor is the language of the text-writers any less explicit. "One redeeming," says the author, "from an invalid sale is required to pay the purchaser only the amount of his bid and six per cent. interest thereon." 2 Blackwell Tax Titles, section 722. "If, however," says another, "the owner of land \* \* \* seeks to redeem the same from an invalid tax sale, he is required to pay the purchaser only the amount of his bid with common interest." Black Tax Titles, section 185. See, also, *Cooley Taxation*, 546. So much for the authorities other than the decisions of this court.

The question under discussion here was not even remotely involved in *State, ex rel., v. Casteel*, 110 Ind. 174. That was a proceeding to compel the auditor of Clay county to refund money paid at a tax sale. It was correctly held that inasmuch as the purchaser had acquired the lien of the State he was not entitled to the remedy sought. In *St. Clair v. McClure*, 111 Ind. 467, no question touching the amount required to be paid by the owner of land sold at an invalid tax sale in order to remove the cloud from his title is suggested. The same may be said of *Morrison v. Jacoby*, 114 Ind. 84. Two points, and two only, are decided in that case. One was, that a purchaser at a tax sale, which is ineffectual to convey title, although he had only a certificate of purchase, is invested with the lien of the State, by the terms of section 6488, above quoted. The other, that a complaint by a land-owner to enjoin the execution of a deed to the purchaser is insufficient unless it shows a sufficient tender, and that the tender was kept good by bringing the money into court.

That the opinion declares the law accurately on both the points involved and decided is beyond controversy. It is

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true some reference appears to have been made incidentally to redemptions from tax sales under section 6466 ; but it is submitted that an examination of the record and opinion fully discloses that no question relating to the amount which the purchaser at an invalid tax sale was entitled to receive was either involved or considered.

The only case decided by this court in which the direct question now under consideration was involved, is *Michigan Mutual L. Ins. Co. v. Kroh, supra*. In that case a taxpayer whose land had been sold in violation of the statute tendered the purchaser, who held a certificate of purchase, merely "the amount of taxes, interest and penalty legally due thereon at the time of sale," as provided in section 6488. In that case, as here, it was insisted that the redemption should have been made under section 6466, and it was held, in effect, that inasmuch as the sale was invalid the purchaser was merely subrogated to the rights of the State, and that until he had received a deed he was entitled to receive only the amount specified in section 6488, viz., the taxes, penalties and interest paid by him, together with six per cent. interest thereon. It is now respectfully submitted that *Michigan Mutual L. Ins. Co. v. Kroh, supra*, is in strict accord with the rule laid down by all the text-writers on taxation, and that it is in harmony with every adjudicated case on the subject except the one now decided by the court. The judgment in the case cited rests upon the assumption that the language found in section 6488, to the effect that the purchaser at a tax sale who fails to acquire title shall be entitled to enforce a lien upon the land for the amount of the taxes, penalties and interest due thereon at the time of sale, together with interest, was to be regarded as expressing the intention of the Legislature in respect to the rights of the purchaser at such sale and the liability of the delinquent taxpayer.

The conclusion reached by the court in the present case seems to be predicated upon the assumption that in order to arrive at the legislative intent in the respects mentioned, sec-

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tion 6466, which relates to statutory redemptions, must be carried forward over twenty-two intermediate sections, and amalgamated with section 6488, which relates to affording security for, and defining the rights of, a purchaser at an invalid tax sale.

From this I dissent, and conclude by adopting the following language from the opinion of the court in *Gage v. Pirtle*, *supra*, a case in every way parallel with the present: "Had it been the intention that the land-owner should pay an amount equal to the sum which would had to have been paid upon redemption of the land from the tax sale, it would have been quite easy to have so said in plain terms, instead of expressing such purpose in the blind and roundabout way of this statute." To hunt for the intention of the Legislature by a hidden, circuitous route when it is plainly and directly expressed, is not admissible.

Filed April 5, 1890.

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No. 14,241.

THE CHICAGO, ST. LOUIS AND PITTSBURGH RAILWAY COMPANY v. BURGER.

RAILROAD.—*Fire from Passing Engine.—Negligence.—Liability of Company.—*

Where a railway company negligently permits dry grass and other combustible matter to accumulate upon its right of way, and they are set on fire by passing engines, and the fire is negligently permitted to escape to the land of an adjoining owner, without negligence on his part, the company is liable.

SAME.—*Contributory Negligence.*—It is not contributory negligence for the adjacent owner to permit dry grass and stubble on his land which will spread fires negligently set by the railway company.

SAME.—*Complaint.—Special Verdict.—Theory Proceeded on.—Judgment.—*

Where the complaint proceeds upon the theory that the plaintiff's injury was caused by the negligence of the defendant in permitting rubbish, and other combustible matter, to accumulate on its right of way from which the fire escaped to the land of the plaintiff; while the ver-

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133	417
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139	415
124	275
141	544
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144	292
146	317
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148	464
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124	275
154	332



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dict rests upon the theory that the injury was occasioned by the negligence of the company in failing to provide its engines with proper spark-arresters, a judgment for the plaintiff based thereon will not be sustained.

**SAME.**—*Special Verdict.*—*Finding of Negligence.*—*Mere Conclusion.*—A special verdict should state facts, not conclusions. A finding that one of the parties has been guilty of negligence is a mere statement of a conclusion, and will not support a judgment.

From the Jasper Circuit Court.

*N. O. Ross, E. P. Hammond and W. B. Austin*, for appellant.

*I. W. Yeoman and S. P. Thompson*, for appellee.

**COFFEY, J.**—This action was prosecuted in the circuit court to recover damages for the destruction of the appellee's meadow by fire, on account of the alleged negligence of the appellant.

We have experienced much difficulty in determining the theory upon which the complaint proceeds. With some reluctance we have concluded that the complaint proceeds upon the theory that the appellant was guilty of negligence in permitting rubbish and combustible material to accumulate upon its right of way, by means of which fire was communicated to the appellee's premises, resulting in the injury of which he complains.

The complaint alleges that appellant's right of way was fenced, on the north side, with a wire fence, against which dry grass, weeds, and rubbish, and other inflammable material, had drifted and lodged, without any fault of the appellee, and was allowed to remain by the negligence of the appellant; that the appellee's meadow was covered with dry grass, either left for seed, or the after-grass grown after mowing; that the locomotive engine, drawing a train of cars on appellant's said road, as the same moved across appellee's land, in an easterly direction, dropped and permitted to escape therefrom sparks and coals of fire, which sparks and coals of fire were allowed and permitted to escape from the flue,

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smoke-stack, and ash-pan by the negligence and carelessness of appellant, in part, in not providing a proper flue, smoke-stack, spark-arrester, and ash-pan, and other means to arrest the escape of sparks and fire, and in part from the negligence and carelessness of appellant's employees in operating the said locomotive engine, whereby the said coals, sparks, and fire escaped from appellant's locomotive and engine, and falling upon said inflammable material upon appellant's right of way, and along appellant's said fence, as well as upon the appellee's ground on the north side of appellant's track and right of way, communicated fire to such inflammable material and dry grass, from whence the fire so kindled, without the fault of the appellee, and by the negligence of the appellant, spread upon and over appellee's said meadow-land, destroying his grass to his damage, etc.

The court overruled a demurrer to the complaint, and upon issues formed the cause was tried by a jury, who, under the instructions of the court, returned a special verdict: The court rendered judgment for the appellee, from which this appeal is prosecuted.

It is first insisted by the appellant that the complaint does not state facts sufficient to constitute a cause of action.

We do not agree with the appellant in this contention. It is settled by the repeated decisions of this court that where a railroad company negligently permits dry grass and other combustible matter to accumulate upon its right of way, which are set on fire by passing engines and the fire is negligently permitted to escape to the land of an adjoining owner, without negligence on his part, such company is liable for the injury resulting from such fire. *Louisville, etc., R. W. Co. v. Parks*, 97 Ind. 307; *Louisville, etc., R. W. Co., v. Krinning*, 87 Ind. 351; *Pittsburgh, etc., R. W. Co. v. Jones*, 86 Ind. 496; *Louisville, etc., R. W. Co. v. Hanmann*, 87 Ind. 422; *Pittsburgh, etc., R. W. Co. v. Hixon*, 110 Ind. 225; *Indiana, etc., R. W. Co. v. Overman*, 110 Ind. 538.

The right of way of a railroad company is only an ease-

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ment, the fee remaining in the owner of the soil, but the railroad company has the exclusive right of possession, so that the owner of the fee has no right to enter and remove combustibles. If the company permits them to accumulate, that fact may warrant a finding of negligence on the part of the company, and it is not contributory negligence for the adjacent owner to permit dry grass and stubble on his land which will spread fires negligently set by the railroad company. *Pittsburgh, etc., R. W. Co. v. Jones, supra.*

It sufficiently appears from the complaint before us that the appellant suffered combustible material to accumulate upon its right of way which was set on fire by a passing engine, and that the appellant negligently permitted such fire to escape to the land of the appellee.

The court did not err in overruling the demurrer to the complaint.

It is also contended by the appellant that the special verdict of the jury is not sufficient to authorize a judgment for the appellee.

It appears from the special verdict that the appellee's meadow was covered with dry grass which had grown up after the mowing season. At the time the fire occurred the wind was blowing from the southwest. The fire caught in the dry grass in the appellee's meadow north of the appellant's right of way, and from sixty to sixty-six feet north of the center of appellant's track. The fire originated from sparks or coals of fire emitted by a passing engine.

In addition to finding the facts above stated, the jury, in their special verdict, say: "The defendant's locomotive, from which the fire escaped, was not provided with a proper spark-arrester. The defendant was guilty of negligence in allowing fire to escape from its locomotive and spread upon plaintiff's land. \* \* \* The negligence of the defendant was the proximate cause of the injury to the plaintiff's meadow."

It will be observed that the verdict rests upon a theory

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entirely different from that upon which the complaint proceeds. The complaint proceeds, as we have seen, upon the theory that the appellee's injury occurred by reason of the negligence of the appellant in permitting rubbish and other combustible matter to accumulate upon its right of way, from which fire escaped to the land of the appellee, while the verdict rests upon the theory that the appellee's injury was occasioned by the negligence of the appellant in failing to provide its engines with proper spark-arresters.

The appellee must recover, if at all, upon the case as made by his complaint, and not upon some other which he might have made. *Thomas v. Dale*, 86 Ind. 435; *Hasselman v. Carroll*, 102 Ind. 153.

But the verdict is not sufficient to warrant a judgment for the appellee upon either theory.

The statements of the jury to the effect that the engine from which the fire escaped was not provided with a proper spark-arrester, that the appellant was guilty of negligence in permitting the fire to escape from the engine, and that the negligence of the appellant was the proximate cause of the injury to the appellee, are merely the statements of conclusions. It is the province of a special verdict to state facts, and not conclusions.

To warrant the court in rendering judgment against the appellant on account of negligence, there should be such a finding of facts as would enable the court to say, as a matter of law, that the appellant had been guilty of negligence. A special verdict should be limited to the case made by the pleadings, should find all the facts proven under the issues, and should not embody statements of conclusions of law or fact. A finding that one of the parties has been guilty of negligence has often been held by this court to be a mere statement of a conclusion. *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Conner v. Citizens St. R. W. Co.*, 105 Ind. 62; *Louis-*

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ville, etc., *R. R. Co. v. Balch*, 105 Ind. 93; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18.

Judgment reversed, with directions to grant a new trial.

Filed June 6, 1890.

No. 12,139.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO  
RAILWAY COMPANY v. HOWARD.

**RAILROAD.—Accident at Crossing.—Evidence.—Res Gestæ.**—In an action for injuries sustained at a railroad crossing by collision with a train, it was competent for the plaintiff's mother, who was present when her husband and daughter left home on the evening of the accident, to testify as to what was said as to their destination when about to depart, such evidence being a part of the *res gestæ*.

**SAME.—Injury by Collision with Train at Crossing.—Contributory Negligence.—Burden on Injured Party.**—Where a party crossing a railroad track is injured by a collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury.

**SAME.—Vigilance.—Burden of Proof.—Train Making up Time.**—The burden is on one injured by a collision with a train at a railroad crossing to show by a preponderance of the evidence that he vigilantly used his eyes and ears to ascertain if a train of cars was approaching. The fact that the train is behind time, and is running faster than usual at the crossing, does not excuse him from exercising the care and caution required of him when the train is running at its usual rate.

**SAME.—Erroneous Instruction.—Obstruction of View.—Failure to Give Signals.—Contributory Negligence.**—It was error to instruct the jury that if the view was obstructed and there was a failure to ring the bell or sound the whistle within eighty rods of the crossing, they might infer want of contributory negligence in attempting to cross the railroad track under any circumstances which would have made it reasonably safe on the supposition that the engine and train were eighty rods away.

**SAME.—Instruction.—Contributory Negligence.—Inference to be Drawn by Jury.**—An instruction that if the whistle was not sounded nor the bell rung this was a circumstance tending to show want of contributory negligence is erroneous; as, also, is an instruction that if there is nothing in the

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evidence tending to show contributory negligence the jury may, without proof, infer there was none.

**SAME.**—*Instruction.*—*Care Required in Case of Obstruction to Sight or Hearing.*

—It is proper to instruct the jury that if there were any obstructions to sight or hearing in the direction of the approaching train as the plaintiff neared the crossing, the obstructions required increased care on the part of the plaintiff in approaching the crossing. The care must be in proportion to the increase of danger that may come from the use of a highway at such a place.

**EVIDENCE.**—*Objection to.*—*Must be Specific.*—No question is presented by an objection that offered evidence is "incompetent, irrelevant and immaterial." The objection must be specific.

**SAME.**—*Examination of Parties.*—*Admission in Evidence of Answers to Interrogatories.*—*Objection of Irrelevancy.*—The plaintiff having the right to introduce in evidence the answers to questions propounded to the defendant (section 359, R. S. 1881), the defendant can not complain of their introduction on the ground of irrelevancy, since if the *interrogatories* are irrelevant he should move their rejection, and if the *answers* are irrelevant the fault is his own.

From the Marion Superior Court.

*T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker and E. Daniels*, for appellant.

*L. Ritter, E. F. Ritter and B. W. Ritter*, for appellee.

**BERKSHIRE, C. J.**—The appellee was the plaintiff below and appellant the defendant. The *gravamen* of the action is negligence, and in the complaint there is the proper negation of contributory negligence.

The appellant answered in general denial.

The cause was submitted to a jury for trial, a verdict returned in favor of the appellee, and over a motion for a new trial judgment was rendered upon the verdict. From the judgment at special term an appeal was taken to general term, and from its judgment affirming the judgment in special term this appeal is prosecuted.

Several errors have been assigned, but we are only concerned with certain questions arising out of the court's action in overruling the motion for a new trial.

It is not our province to determine whether the twenty

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sixth question put by the appellee to the witness John Kissel, and his answer thereto, were or were not improper, for the reason that no specific objection was made to the same. It has been held time and again that a general objection to the admission of evidence in answer to a question propounded to a witness raises no question for our consideration. The objection which we find in the record is that the evidence "is improper and incompetent." This is a stereotyped objection to the admission of offered evidence that is without value for any purpose.

There is no available error in the record as to the ruling of the court in allowing the witness Oliver Klingensmith to answer question twenty-seven, propounded to him by the appellee. The objection made was: "We object to it as not rebutting anything, and as incompetent and irrelevant, and immaterial, and having nothing to do with the matter." The objection is too general, but in view of the testimony as to the distance the road crossings were from each other, introduced by the appellant, and the further testimony introduced by the appellant as to the different points at which the whistle was sounded, we are of the opinion that the question and answer were proper. The illustrations given by counsel for the appellant in their original brief are not parallel cases. What we have said as to the question put and answer given thereto by the witness Oliver Klingensmith, applies equally to the question propounded to Francis Mathes and his answer to the same.

The objection to the twenty-first question asked of Mrs. Sarah F. Howard, and her answer thereto, is that the evidence "is incompetent, irrelevant and immaterial." The objection is unavailing.

The objections to questions seventeen and eighteen, propounded to this witness, and her answers thereto, are unavailing.

The testimony was not improper. The witness was the mother of the appellee and the wife of Dr. Howard, who

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lost his life in the accident involved in this controversy. When the husband and daughter left their home, which was also the home of the witness, on the fatal evening, she was present. What was said when they were about to depart as to their destination was not mere hearsay, but was a part of the *res gestæ*. It was preliminary to what afterwards happened. Such testimony is always competent.

The appellee was permitted by the court to introduce in evidence certain answers given to certain interrogatories propounded by the appellee to the appellant.

Section 359, R. S. 1881, entitled the appellee to propound interrogatories to the appellant relative to the matter in controversy, and required the appellant to answer the same. After the interrogatories had been answered, by virtue of the same section of the statute, it was the appellee's right to introduce the answers in evidence if she so desired. If the interrogatories were not relevant the appellant should have moved their rejection; if the appellant gave irrelevant answers to the interrogatories, that was its own fault, and it can not complain that they were introduced in evidence.

This brings us to the questions arising in the record because of the instructions given to the jury by the court and those refused.

This is an action to recover damages because of injuries to the appellee occasioned by an accident occurring at a point where the appellant's railroad crosses a certain highway located in Marion county, Indiana.

The appellee and her father, Dr. Howard, were in a buggy, drawn by one horse, and were in the act of passing over the railroad track when struck by one of the appellant's locomotive engines pulling a train of cars along its said railroad and across said highway.

The correctness of the instructions depends upon the duties and liabilities of the parties under the recognized rules of law in such cases. And at this point, as well as at any other, we may state that there was a conflict in the evidence as to



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whether the whistle was sounded and the bell rung as the statute law of the State then required, and the jury having found that they were not, we are concluded by the finding, and in the further consideration of the case shall take it for granted that the appellant was guilty of negligence contributing to the disaster.

This will leave but the one main fact, and the questions which are involved relating to it, the want of contributory negligence on the appellee's part.

In *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25, the following instruction was held to be correct as a statement of the law: "When a person crossing a railroad track is injured by a collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively, that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury."

In the case of *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31, it is said: "In cases where contributory negligence may be claimed, it is settled in this court that the absence of contributory negligence is part of the plaintiff's case, both as to averment and proof."

In *Lyons v. Terre Haute, etc., R. R. Co.*, 101 Ind. 419, it is said: "It is too well settled to admit of debate that a party who sues for an injury to person or property resulting from negligence must prove that he was himself without negligence. *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486, and authorities cited."

In *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279, it is said by this court: "It may suffice to say, since it is the established rule of this court, as it is of the courts in a large majority of the States, that it must be affirmatively shown that the injured party was in the exercise of due care at the time the accident occurred. At least, it must be made to appear that want of care on his part in no way contributed to bring about the injury, or helped to produce the accident for which compensation is sought."

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In view of these authorities the following instructions asked by the appellee, and given by the court, were erroneous:

"No. 2. A traveller upon a public highway in this State has a right to assume that a railroad company, whose track crosses such highway, will obey the law and give the signals required by law upon the approach of trains to such crossing, and (although the failure to give such signals does not release the traveller from exercising due care), if no such signals are given, and the view is obstructed and there are no indications to the contrary, the traveller, is not guilty of contributory negligence in assuming that no train is advancing upon such crossing within eighty rods thereof.

"No. 4. The burden is upon the plaintiff to show that there was no negligence upon her part contributing to the injury complained of; but this need not necessarily be shown by directly affirmative evidence, but may be shown by proving the facts and circumstances from which it may be inferred. If all of the circumstances under which the said injury occurred are put in evidence, and upon an examination of them nothing is found in acts or omissions showing contributory negligence, or ground for suspecting or inferring such negligence on the part of the plaintiff, the inference of care upon her part may be drawn from the absence of all appearance of fault, either positive or negative, on the part of plaintiff, in the circumstances under which the injury was received; and in considering the question of due care on her part, you have a right to take into consideration, together with the other facts and circumstances in the case, the instinct of self-preservation and the known and ordinary disposition of all persons to guard themselves against danger.

"No. 5. It was the duty of the defendant, by her employees in charge of such train in approaching said crossing, when not less than eighty (80) nor more than one hundred (100) rods distant therefrom, to sound the whistle on such

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engine distinctly three (3) times, and to ring the bell upon such engine continuously from the time of sounding such whistle until such engine had fully passed said crossing; and although the failure to give such warning of the approach of such train, did not relieve the plaintiff from exercising due care to avoid the injury, yet if no such warning was given, the absence of such warning is a circumstance to be considered in determining whether such care was exercised by the plaintiff."

The second instruction could have lead the jury to no other conclusion, if the view was in some way obstructed between that part of the highway over which the appellee was approaching the crossing and the railroad, and there had been a failure to sound the whistle attached to the locomotive engine or ring its bell within eighty rods of the crossing, and if she could have crossed in safety had the approaching train been eighty rods away, than that she was not guilty of contributory negligence, even though she drove upon the crossing without stopping to look or listen for an approaching train. In other words, from a slight obstruction of the view, and a failure to ring the bell or sound the whistle, the jury might infer want of contributory negligence in attempting to cross the railroad track under any circumstances which would have made it reasonably safe on the supposition that the engine and train were eighty rods away.

By the fourth instruction the jury are told, substantially, that if there is nothing in the evidence tending to show contributory negligence, they may without proof infer there was no such negligence.

By the fifth instruction the jury are told that if the whistle was not sounded nor the bell rung, this was a circumstance tending to show want of contributory negligence, and as a logical sequence (if it were a circumstance in that direction), the jury were told that they might find therefrom that it was sufficient to establish the fact, as it was for them to determine as to the weight of the evidence.

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This very instruction may have misled the jury, and caused them to find want of contributory negligence.

The court should have given instructions numbers three, eight and eleven, or their equivalent, asked by the appellant, as they stated the law correctly, and were applicable to the evidence:

"No. 3. The burden is on the plaintiff to show, by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching, and if this has not been shown to you by a preponderance of the evidence, the plaintiff can not recover."

"No. 8. When a person crossing a railroad track is injured by collision with a train, the fault is, *prima facie*, her own, and she must show affirmatively that her fault or negligence did not contribute to the injury before she is entitled to recover for such injury."

"No. 11. The fact that the train was behind time, and was running faster than its usual speed at the crossing to make up time, did not excuse the plaintiff or her father from exercising the care and caution required of them when the train was on time, and running at its usual rate of speed at that crossing."

In *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 257, it is said: "Mere proof that the negligence of the defendant was a cause adequate to have produced the injury will not enable a plaintiff to recover, as it does not necessarily give rise to the inference of due care upon his part, proof of which is essential to his case." See *Sherlock v. Alling*, 44 Ind. 184.

In *Indiana, etc., R. W. Co. v. Greene*, *supra*, it is further said: "The facts and circumstances, illustrating the conduct of the injured person at the time of the accident, must be made to appear. If from these the inference can be drawn that proper caution was exercised, it may then be said, the presumption of contributory negligence has been affirmatively removed." The trial court in that case gave the fol-

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lowing instruction : " The allegation that the injury occurred without the fault or negligence of the plaintiff's intestate, must be proved by the plaintiff, but at the same time it is a negative averment, and if the plaintiff has shown by the evidence that the injury occurred as charged, resulting in the death of the plaintiff's intestate, and that it was caused by the negligence of the defendant as charged, without showing any contributory negligence or ground for inferring, or reasonably suspecting such negligence, she will be entitled to recover without making direct and affirmative proof on that subject. In the absence of circumstances to show or suggest it, there is no presumption of contributory negligence."

This instruction was held to be erroneous, and the court said, speaking of the appellant : " He must show the facts, as well those which relate to his share in the transaction as those which relate to the defendant's, and if upon the whole case the inference of negligence arises against the defendant, and of due care on his part, he may recover. The fact that a person travelling on a highway comes in collision with a train on a railway crossing is of itself sufficient to suggest a presumption of contributory negligence against him in a suit for compensation." *Cincinnati, etc., R. R. Co. v. Butler, supra*; *Hathaway v. Toledo, etc., R. W. Co., supra*; see *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490, upon the last proposition above.

It is the rule that a person before crossing a railroad track must stop, look, and listen, and it applies to pedestrians as well as to others. *Pennsylvania R. W. Co. v. Aiken*, 18 Atl. Rep. (Pa.) 619; *Butler v. Gettysburg, etc., R. R. Co.*, 126 Pa. St. 160.

In *Allen v. Maine, etc., R. R. Co.*, 19 Atl. Rep. (Me.) 105, it is said : " The evidence shows that, at twenty-five or thirty feet from the crossing, the approaching train from Bath might have been seen by the plaintiff several hundred feet distant from the crossing. The plaintiff did not look in that direction until his horse's forefeet were between the rails.

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Was the neglect on his part to look in that direction a want of ordinary care and prudence? Is a traveller justified in driving upon a railroad crossing, in the absence of safety signals giving him the right to cross, without looking for an approaching train? It has been many times decided in this court that the traveller, before crossing a railroad must both look and listen. \* \* If the crossing at which the plaintiff was injured is so constructed that an approaching train can not be seen until a traveller comes very near to the railroad track, common prudence requires him to approach at such speed that when an approaching train may be seen, he may be able to stop, and allow such train to pass."

To the same effect are our own cases. *Cincinnati, etc., R. Co. v. Butler, supra*, and cases cited; *Indiana, etc., R. W. Co. v. Greene, supra*. See, upon these different propositions, *Chicago, etc., R. W. Co. v. Hedges*, 118 Ind. 5; *Cones v. Cincinnati, etc., R. W. Co.*, 114 Ind. 328; *Ohio, etc., R. W. Co. v. Hill*, 117 Ind. 56; *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1.

In the light of these authorities the following instruction requested by the appellee, and given by the court, was erroneous :

"No. 8. There is no rule of law which requires a traveller upon a public highway, in approaching a railroad crossing, to stop his team still. But, in determining the question of plaintiff's contributory negligence, it is for you to say whether the course pursued by the plaintiff was such as would have been adopted by an ordinarily cautious and prudent person, in the exercise of reasonable care to avoid injury, under the facts and circumstances of this case as disclosed by the evidence. And I leave it for you to say whether there were such obstructions to the view of the train that did the injury, and such lack of warning on the part of the defendant of its approach as would lead an ordinarily cau-

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tious and prudent man, in the exercise of reasonable care to avoid injury, to believe that no train was approaching within such distance of the crossing as to make his endeavor to pass the same dangerous."

From this instruction the jury could well infer, if it appeared that there was some lack of warning that the train was approaching the crossing, and that the view between the appellee and the approaching train was obstructed, that it then became a question for their determination as to whether such lack of warning, together with the obstructed view, were sufficient to lead a person of ordinary prudence and judgment to the conclusion that there was no train approaching within such a distance as to render it unsafe for the appellee and her father to attempt to pass over the track; and if so, then they were not guilty of negligence in attempting to pass over without first stopping and exercising their senses of hearing and sight.

In our opinion instruction number fifteen, asked by the appellant, contained a correct statement of the law, and should have been given. This instruction reads thus:

"No. 15. If there were any obstructions to sight or hearing in the direction of the approaching train, as the plaintiff and her father neared the crossing, the obstructions required increased care on the part of the plaintiff and her father on approaching the crossing. In such case the care must be in proportion to the increase of the danger that may come from the use of the highway at such a place."

When applied to the evidence in the case, all of the foregoing instructions asked by the appellant were exceedingly pertinent as well as proper.

While we do not condemn instruction number one, asked by the appellee and given by the court, in the abstract, we think that there was no evidence which made it pertinent, and that it was calculated to mislead the jury. The said instruction is as follows:

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The Cincinnati, Indianapolis, St. Louis and Chicago R'y Co. v. Howard.

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"No. 1. If you find from the evidence that the plaintiff was injured by the defendant's train while travelling upon a public highway, as alleged in her complaint, that the whistle was not sounded and the bell rung as required by law, as said train approached said crossing, and that plaintiff was misled by defendant's failure to give such warning, and without fault or negligence on her part, and without notice of the approach of said train, was placed in a position of great peril, and, in the excitement of that peril, and in the effort to escape, made a mistake as to the proper course to be pursued, and injury resulted, such error of judgment is not contributory negligence and will not bar a recovery by her for the injury sustained."

We may add further, that we find no evidence tending to rebut contributory negligence on the appellee's part. In view of the authorities, not a circumstance.

As to the circumstances which found the appellant and her father on the crossing when the misfortune overtook them, the evidence is an entire blank. Whether or not they saw the train approaching, or heard the sound which a moving train gives out, and were deceived as to the distance it was from them and attempted to cross the track notwithstanding, we do not know. The rate of speed at which they approached the crossing, and whether or not they stopped and exercised their senses of hearing and sight, are facts which do not appear in the evidence.

In view of the authorities which we have cited, and especially the cases of *Indiana, etc., R. W. Co. v. Greene, supra*, and *Cincinnati, etc., R. R. Co. v. Butler, supra*, the case at bar seems to have been tried upon a theory entirely erroneous. The case of *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476, relied upon by the appellee, is not in harmony with our earlier cases, and is out of line with those more recent, the later cases following the earlier ones, and upon the questions involved in the present case can not be regarded as an



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authority since the case of *Cincinnati, etc., R. R. Co. v. Butler, supra*. The judgment must be reversed.

Judgment reversed, with costs.

Filed June 6, 1890.

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 No. 15,360.

## QUILL v. THE CITY OF INDIANAPOLIS ET AL.

**MUNICIPAL CORPORATION.—Street Improvement.—Barrett Law.—Notice.—Committee to Hear Objections.**—Section 2 of the act of March 8th, 1889, entitled "An act concerning powers and duties of cities and incorporated towns, \* \* \* providing the mode and manner of making street and alley improvements," etc., which provides for notice to the property-owners of the time and place where they may make objection to the necessity of the improvement contemplated, does not require the appointment of a committee to hear the objections, or that there should be any determination of the rights of the objectors. It simply contemplates that no action shall be taken by the common council after resolving to make the improvement until notice is given, and an opportunity afforded the property-owners to present for the consideration of the council such objections as they may make to the necessity for the construction of the work. This object is accomplished by requiring objections to be filed with the clerk to be by him laid before the common council.

**SAME.—Constitutional Inhibition Limiting Indebtedness of Cities.—Bonds Issued in Pursuance of Barrett Law not Indebtedness Within.**—Bonds or certificates issued in pursuance of the provisions of the act, do not create an indebtedness within the inhibition of article 13 of the Constitution, declaring that no municipal corporation shall become indebted to an amount in excess of two per cent. of its taxable property. The bonds issued by the city for the purpose of raising money with which to pay for the improvement, or issued to the contractor in payment for the work, bear the name of the street or alley improved or sewer constructed, and are payable out of the special street improvement fund to be accumulated from assessments made against the property benefited; and hence no indebtedness arises against the city.

**SAME.—Debt.—Essentials of.**—It is essential to the idea of a debt that an obligation should have arisen out of a contract, express or implied, which entitles the holder thereof unconditionally to receive from the promisor a sum of money which the latter is under a legal or moral duty to pay without regard to any future contingency.

124	292
125	410
125	463
127	505
124	292
132	217
124	292
135	631
124	292
138	632
124	292
141	350
124	292
145	168
146	471
147	508
124	292
148	473
149	132
152	370
124	292
153	257
153	280
153	575
124	292
154	481
154	487
154	516
154	529
154	638
155	253
155	633
124	292
158	527
124	292
161	49
124	292
163	85
163	227
124	292
168	66
124	292
171	129

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**SAME.—Assessments.—How Upheld.**—Assessments for street improvements are upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received peculiar benefits which the citizens do not share in common. The municipality, as such, is not benefited by the improvement, and there is, hence, under the law in question, neither a legal nor moral obligation to pay.

**SAME.—Street and Alley Crossings.—Improvement of.—Payment in Cash by City.**—The municipal corporation becomes liable to pay in cash the expense for so much of street and alley improvements as shall be occupied by the street and alley crossings, upon the completion and final estimate of the work, and hence no debt results from such improvement.

**SAME.—Waiver of Irregularities in Assessment.—Provision Relating to.—Constitutionality of.**—A property-owner who, in consideration of the right to pay his assessment in semi-annual instalments, has agreed that he will waive all irregularities in the assessment, can not question the validity of the provision of the act that "no suit shall lie to restrain or enjoin the collection of such assessment," and that the validity of such assessment shall not be questioned. Such provision applies only to those persons who, in consideration of their right to pay their assessments in semi-annual instalments, agree in a writing, to be filed with the city clerk, that they will not make any objection to the legality or regularity of their respective assessments, and is constitutional.

From the Marion Circuit Court.

*A. Zollars, C. S. Denny and W. F. Elliott, for appellant.*

*W. L. Taylor, for appellees.*

**MITCHELL, C. J.**—It is shown by the complaint, upon which all the questions in the present case arise, that the plaintiff, Thomas F. Quill, is a resident taxpayer of the city of Indianapolis, and the owner of a certain described lot in one of the additions to the city. It appears that the common council and board of aldermen, in August, 1889, assuming to proceed under the authority of the act of March 8th, 1889, entitled "An act concerning powers and duties of cities and incorporated towns, \* \* \* providing the mode and manner of making street and alley improvements, and building sewers, \* \* and permitting cities and incorporated

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towns to issue street and sewer improvement bonds," passed an ordinance for the improvement of a certain designated street in the city on which a lot owned by the plaintiff abutted. The contract for the improvement was duly awarded to Robert Kennington, who completed the work accordingly, after which the city engineer made and reported his final estimate of the total cost of the improvement and apportioned the amount to the several lots and parcels of land bordering on the street, as required by section 817, Elliott's Supp., being section 6 of the above act. The report having been presumably adopted, and an assessment made by the proper authorities after due notice, it is averred that the contractor threatened to enforce payment of the amount assessed against the plaintiff's lot, and being unable to pay, it is alleged that the plaintiff, in order to prevent the sacrifice of his property, executed, under protest, a written agreement, in which he stipulated, in effect, that, in consideration of having the right to pay the amount assessed against his lot in instalments, he would make no objection to the legality or regularity of his assessment, etc.

It is also averred that in making the improvement the city incurred a debt of \$97 for that portion thereof occupied by street and alley crossings, which it is alleged is in violation of the Constitution of the State, and that the corporation is about to issue bonds as provided in the act mentioned to cover the cost of the improvement. After setting out the amount or value of the taxable property within the city, and the present indebtedness, it is averred that the indebtedness already exceeds two per centum of the value of all the taxable property. It is also averred that while the property-owners were duly notified as provided in section 2 of the act, of the time and place where they might make objection to the necessity of the improvement, no committee was appointed to hear the objections, which, according to the direction of the common council, were required to be filed with the city clerk. It is contended that the giving of such a

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Quill v. The City of Indianapolis *et al.*

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notice was not a compliance with the provisions of the act, because no committee was appointed to hear and determine the validity of the objections. It is also contended that the city has no power to issue the bonds provided for in the act, because its present indebtedness exceeds the limit fixed by article 13 of the Constitution of the State, and that so far as the act assumes to authorize the issuing of bonds without regard to the amount of the existing indebtedness it is unconstitutional.

Elliott's Supp., section 813, requires the common council, whenever it deems it necessary to make any of the improvements authorized by the act, to declare the necessity therefor by resolution, and also to state the kind, size, location, and terminal points thereof. Ten days' notice of the passage of the resolution is required to be given by two weeks' publication in some newspaper of general circulation; and it is also required that the notice thus published shall state the time and place where the property owners along the line of the proposed improvement can make objections to the necessity for the construction thereof. This statute contemplates the publication of notice for two successive weeks, ten days prior to the day fixed for making objections; that is, the first publication must have been made twenty-four days before the time therein fixed. The statute does not require or contemplate the appointment of a committee to hear the objections, or that there should be any determination of the rights of the objectors. It simply contemplates that no action shall be taken by the common council after resolving to make the improvement until notice is given, and an opportunity afforded the property owners to present, for the consideration of the council, such objections as they may make to the necessity for the construction of the work. It is designed to prevent the city authorities from entering inconsiderately upon the construction of expensive improvements, without affording the property owners, who are, in the end, to pay for them, the opportunity to present their

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objections at the outset, which are intended to be rather as advisory to the common council than otherwise. This purpose could be accomplished as well by requiring objections to be filed with the clerk, to be by him laid before the common council, as in any other way. The right of the property owners to appear before the common council for the purpose of urging the validity of any objections filed with the clerk is in no way abridged or impaired. The right to a hearing is secured to each property-owner by another provision of the act. We discover no valid objection to the notice.

It is conceded that the present bonded indebtedness of the city exceeds the limit fixed by the Constitution, but it is contended that the cost of improving the street and alley crossings, payable by the city, must and will be paid in cash, and that the bonds authorized by the act in question are merely improvement bonds, for the payment of which the city is not liable, and that they are, hence, not an indebtedness of the city within the contemplation of the Constitution. So much of article 13, of the State Constitution, as is germane to the subject under examination, declares that "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two *per centum* on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void."

It becomes necessary to determine whether bonds or certificates issued in pursuance of the provisions of the act above mentioned, create an indebtedness within the inhibition of article 13. It is essential, therefore, that we consider the act and ascertain its scope, purpose and effect. An examination of the statute discloses at once that the entire cost and expense of constructing any work or improve-

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ment provided for therein, for the payment of which bonds or certificates may be issued, is to fall primarily and exclusively upon the property benefited, except only for such part of the work as shall be occupied by street and alley crossings, the expense of which the corporation is to pay. Provision is made whereby, during the progress of the work, estimates may be made from time to time of the amount of work done by the contractor, and the amount of the estimates, less a reasonable percentage to secure the completion of the contract, may be paid out of the corporate treasury, but the amount of such estimates is made a lien upon the several parcels of ground upon which they are assessed in favor of the municipality and the owner of the certificates or bonds which may afterwards be issued. Elliott's Supp., section 816. Of course the money thus advanced by the city does not constitute a debt against the city. It is simply money advanced by the city to be repaid by the property-owners.

The statute provides that when the work is completed a final estimate of the total cost thereof is to be made and distributed according to a rule prescribed against each lot or parcel of ground bordering on the street or alley improved. This is to be reported to the common council of the city. Notice to, and a hearing by, each person feeling himself aggrieved is provided for, and after the report, with such alterations or amendments as may be made, is adopted, the common council is required to assess against the several lots or parcels of ground, the several amounts which should be assessed on account of the improvement. The amounts so assessed become a lien upon the several lots or parcels of ground, and are to be placed on the city tax duplicate and charged against the several lots, and become payable in ten per cent. instalments, to be collected as other taxes are collected, with six per cent. interest, to be calculated from the date of the final estimate, payable semi-annually. It is provided that the proceeds arising from the assessments so made, when collected, shall constitute a special fund for the pay-

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ment of the costs of the improvement, and the bonds and certificates thereafter provided for. Provision is made for the issuance of bonds by the city for the purpose of raising money with which to pay for the improvement, or bonds or certificates may be issued to the contractor in payment for the work, but in either case it is required that the bonds shall bear the name of the street or alley improved, or sewer constructed, and that they shall be payable out of the special fund provided for in the act.

Without summarizing further, it is enough to say the remedy of the holders of the bonds or certificates is confined exclusively to the special fund provided for and to the collection of assessments by enforcing the lien upon the lots or parcels of ground assessed with the cost of the improvement. The city is in no way liable for the payment of the bonds except out of the special fund to be accumulated from assessments made against the property benefited. According to the scheme promulgated in the statute, in case the assessments are paid without delinquency, it is impossible for a single bond or certificate to mature in advance of the accumulation of a special fund devoted exclusively to its payment.

If the assessments become delinquent the remedy of the holders of the bonds or certificates is confined to the property; there is no liability against the city. The special fund provided for and the property are the sources from which the holders of the bonds and certificates must receive their pay, the city authorities acting merely as an agency for making and collecting the assessments, and as the custodian of the fund when the assessments are collected. In this they do not act as the agents of the city, but as special agents, to accomplish a public end. *Board, etc., v. Fullen*, 111 Ind. 410.

A fair interpretation of the statute requires that the character of the bonds, and the fact that they are payable out of a special street improvement fund, shall appear upon the face of the paper, thus making it apparent to the world that they

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are not to be regarded as the obligations of the corporation. While the common council and officers of the city are designated as the instruments to be used in executing the scheme devised, it is apparent all the way through that the entire expense of constructing an improvement for which bonds may be issued is to be borne exclusively by the property benefited.

In *Strieb v. Cox*, 111 Ind. 299, it was held that bonds issued by the board of county commissioners for the purpose of raising money to pay for the construction of a free gravel road, do not constitute an indebtedness against the county within the inhibition of article 13 of the State Constitution. The principles which uphold that decision fully sustain our conclusion in this. See, also, *Board, etc., v. Hill*, 115 Ind. 316.

Merely issuing bonds or certificates which show upon their face that they are issued in the course of constructing a street improvement, and that they are payable out of a special fund to be derived from assessments upon the property bounding on the street, is very far from creating a debt against the city. An indebtedness can not arise unless there is either a legal, equitable or moral obligation to pay a sum of money to another, who occupies the relation of creditor, and who has a legal or moral right to call upon or constrain the debtor to pay. *State, ex rel., v. Hawes*, 112 Ind. 323. It is not always essential, in order to the existence of an indebtedness, that there should be an absolute legal right to coerce payment, as in that sense the State could never become indebted. *Mayor, etc., v. Gill*, 31 Md. 375. It is, however, essential to the idea of a debt that an obligation should have arisen out of a contract, express or implied, which entitles the holder thereof unconditionally to receive from the promisor a sum of money which the latter is under a legal or moral duty to pay, without regard to any future contingency. Assessments for street improvements are upheld on the ground that the adjacent property upon which the cost



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of the improvement is assessed, is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received peculiar benefit which the citizens do not share in common. *Heick v. Voight*, 110 Ind. 279; *Ross v. Stackhouse*, 114 Ind. 200; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Chamberlain v. City of Cleveland*, 34 Ohio St. 551.

The municipality, as such, is not benefited by the improvement, and there is, hence, under the law in question, neither a legal nor moral obligation to pay. The moral and legal duty of the city to pay depends upon the contingency or condition of the special fund out of which payment is to be made. If the officers of the city discharge the duties devolved upon them by the statute, their power over the subject is exhausted. They are nowhere authorized to create an indebtedness against the city as such.

In *Sackett v. City of New Albany*, 88 Ind. 473, speaking in reference to the constitutional inhibition now under consideration, this court said: "By 'indebtedness,' in this connection, we mean an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agreement." Within the definition above stated it is abundantly clear that no indebtedness can possibly result against a city from the issuance of street improvement bonds.

In *City of Valparaiso v. Gardner*, 97 Ind. 1, the general conclusion was reached, after most thorough and careful consideration, that in case the current resources of a city are sufficient for the payment of a debt when it comes into existence, a contract to supply water to a city, under which debts against the city may arise from time to time, covering a period in the future, was not within the inhibition of the Constitution. These cases are more than sufficient to vindicate our conclusion that any bonds which can be issued under the law in question are not affected by the Constitutional inhibition.

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As respects the expense for so much of street and alley improvements as shall be occupied by the street and alley crossings, it is fairly apparent from the whole scope and tenor of the law that the corporation becomes liable to pay that in cash upon the completion and final estimate of the work, or as estimates therefor may be made from time to time. This being so no debt results on that account.

It is said, however, that so much of section 819 as provides that "no suit shall lie to restrain or enjoin the collection of such assessment," and that the validity of such assessment shall not be questioned, is unconstitutional, because it is an attempt to deprive the land-owner of all substantial remedy for the protection of his property, thereby in effect depriving him of his property without due process of law.

While we are satisfied that it would be within the power of the Legislature to enact that one who had stood by while an improvement was being made, under color of statutory authority, until the work was substantially completed, and until his property had received the benefit of the money expended, should not thereafter question the validity of the assessment, we are not required to go to that extent in the present case. *Prezinger v. Harness*, 114 Ind. 491; *Ross v. Stackhouse*, *supra*.

It is apparent from the connection in which it occurs, that the above provision only applies to those persons who, in consideration of their right to pay their assessments in semi-annual instalments, agree in a writing, to be filed with the city clerk, that they will not make any objection to the legality or regularity of their respective assessments. Such an agreement is required by section 821 as the condition upon which the property-owner may secure the benefit of the instalment scheme for which the act provides. When the work is completed the property-owner has his election to refuse to sign the agreement provided for, and stand upon his common law rights in respect to contesting the validity of the assessments made against him, in which case the assess-

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The State, *ex rel.* Ely, Drainage Commissioner, *v.* Smith *et al.*

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ment becomes due when made, or he may waive any irregularities, and secure the benefit of ten years' time by signing an agreement to that effect. Since, as we have seen, the law makes no provision whereby the bonds go out with any credit from the municipality issuing them, this feature of the law puts the securities or bonds beyond question, by giving them the absolute credit of the property upon which they are made a lien, of the same degree as taxes are a lien, and removing all question as to the validity of the assessments.

While, as we have said, we do not doubt the power of the Legislature to incorporate into the statute the feature complained of, even without the agreement, for it is little else than the affirmation of a common law principle, there is no room to question its validity as applied to one who has signed the agreement provided for.

What has been said disposes of all the questions argued or involved in the record, and as we find no ground for reversing the ruling of the learned court from which the appeal is prosecuted, the judgment is affirmed, with costs.

Filed Feb. 8, 1890; petition for a rehearing overruled June 6, 1890.

124	302
131	599
124	302
1162	641

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No. 14,436.

THE STATE, *EX REL.* ELY, DRAINAGE COMMISSIONER, *v.*  
SMITH *ET AL.*

**DRAINAGE.**—*Insufficient Description of Property Assessed.*—*Reformation.*—A drainage commissioner, on a showing that in the original petition there was an insufficient description of the property upon which the assessment was levied, is entitled to have the description so corrected, or reformed, as to make the assessment effective.

From the Huntington Circuit Court.

*T. E. Ellison*, for appellant.

*J. B. Kenner* and *J. I. Dille*, for appellees.

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The State, *ex rel.* Ely, Drainage Commissioner, *v.* Smith *et al.*

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ELLIOTT, J. —The relator's complaint is the same in its essential features as that in the case of *Chaney v. State, ex rel.*, 118 Ind. 494, except that it shows that in the original petition there was an insufficient, or erroneous, description of the property upon which the assessment was levied. The decision in the case cited settles all the questions involved in the present case, except that arising on the allegations concerning the erroneous description, and the prayer that the assessment be enforced against the property benefited by a true and accurate description.

We can perceive no valid reason why the relator may not have the description made accurate and specific, and thus enforce the assessment against the property actually benefited. It is to be kept in mind that the commissioner is required to file a complaint to enforce the assessment, in a superior court of general jurisdiction, and the property owner is entitled to notice in the action thus instituted. The parties have, therefore, an opportunity to litigate all proper questions, and the court can render an effective decree, justly adjudicating upon the merits of the controversy. We think it may reform a description, for the parties are before it, and it has jurisdiction of the subject. Certainly, justice requires this, for the property actually benefited should bear its proportion of the expense of constructing the drain; and where the court can ascertain the true and full description of that property it ought to reform mistakes and correct errors so that the assessment can be enforced. We regard the complaint as sufficient to require an answer.

Whether the appellee may controvert the validity of the assessment, upon the ground that she was misled by the description, or whether she may interpose other defences, we do not decide. All that we decide is that, *prima facie*, the relator was entitled to have the description so corrected, or reformed, as to make the assessment effective.

Judgment reversed.

Filed March 18, 1890; petition for a rehearing overruled June 6, 1890.

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 Clanin v. Fagan.
 

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No. 14,381.

## CLANIN v. FAGAN.

124	304
127	550
124	304
144	433
124	304
151	499

**ANIMALS.—Vicious Dog.—Injuries by.—Complaint.—Sufficiency of.**—A complaint in an action for injuries caused by defendant's dog, which alleges that on and before a day named "the defendant kept a dog which he well knew was of a fierce and dangerous nature, and improper to go at large, and accustomed to attack and bite mankind; yet the defendant wrongfully and negligently allowed said dog to go at large without being properly secured; that on said date said dog, without any fault on the part of the plaintiff, attacked and bit the plaintiff," is not subject to the objection that it does not specifically allege that the defendant, at the time of the injury, was permitting his dog to run at large knowing his vicious disposition.

**INSTRUCTIONS TO JURY.—To be Considered as a Whole.—Bill of Exceptions.**—Instructions must be considered as a whole, and if sought to be reviewed in the Supreme Court they must be brought into the record by a bill of exceptions, or signed by the judge, and filed as part of the record.

**EVIDENCE.—Admissibility.—Question of.—Improper Presentation.**—No question is presented as to the admission of evidence where it does not appear from the record how the evidence was given—whether it was in response to a question or was volunteered—or what objection was made.

From the Grant Circuit Court.

*J. L. Custer*, for appellant.

*G. W. Harvey* and *H. J. Paulus*, for appellee.

**OLDS, J.**—This was an action by the appellee against the appellant for injuries caused by the bite of a dog kept by the appellant. The appellant demurred to the complaint, which demurrer was overruled, and an answer in general denial filed to the complaint. Trial was had, resulting in a verdict and judgment in favor of appellee. Appellant filed a motion for a new trial, which was overruled, and exceptions reserved.

Errors are assigned as to the overruling of the demurrer to the complaint and the motion for a new trial.

The objection urged to the complaint is that it does not specifically allege that the appellant, at the time of the in-

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jury, was permitting his dog to run at large, knowing his vicious disposition.

This objection is not well taken ; the complaint alleges "That on and prior to the 13th day of September, 1887, the defendant kept a dog which he well knew was of a fierce and dangerous nature, and improper to go at large, and accustomed to attack and bite mankind ; yet the defendant wrongfully and negligently allowed said dog to go at large without being properly secured ; that on said date said dog, without any fault on the part of the plaintiff, attacked, and bit and wounded plaintiff." This is a sufficient allegation to avoid the objection urged to the complaint.

It is next contended that the court erred in an instruction given to the jury on the question of the measure of damages. But the instructions given by the court are not in the record, and therefore no question is presented as to the instruction complained of. Instructions must be considered as a whole, and if sought to be reviewed in this court must be brought into the record by a bill of exceptions, or signed by the judge, and filed as part of the record. In this case only a detached portion of an instruction is in the record.

It is also contended that the court erred in the admission of certain evidence as to acts of viciousness on the part of the dog after the injury to the appellee. Some evidence of this character is in the record in narrative form, after which there is a statement that the appellant objected to its introduction for certain stated reasons.

It is contended on the part of the appellee that this evidence was competent, as showing the vicious character of the dog within a few days after he injured the appellee. In view of the other evidence in the case it was no doubt harmless, even if erroneous, but the record is not in shape to present any question as to its admission.

In *Vickery v. McCormick*, 117 Ind. 594, the court states the rule to be : "In order to make an objection to evidence

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Hunt *et al.* v. The State, *ex rel.* City of Anderson.

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available, the objection must be made when a question which seems to invite objectionable evidence is asked, and the particular evidence as well as the specific grounds of objection must be fairly pointed out and stated, or if objectionable evidence is volunteered by a witness, or given in an answer that is not responsive to the question asked, or otherwise, before objection can reasonably be made, a motion should be made to strike out the particular matter which is considered objectionable."

It does not appear by the record in this case how this evidence was given—whether it was in response to any question or not. If in response to a question asked for the purpose of eliciting it, the objection should have been made to the question. If such statements were volunteered by the witness, or made in response to a question not calling for such testimony, then there should have been a motion to strike the testimony out, and an exception reserved if the motion to strike out was overruled.

Lastly, it is objected that the damages are excessive. There is no merit in this objection. The verdict and judgment is for \$500, and the evidence fully warranted the jury in assessing that amount.

There is no available error in the record.

Judgment affirmed, with costs.

Filed June 17, 1890.

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No. 14,270.

HUNT ET AL. v. THE STATE, EX REL. CITY OF ANDERSON.

CITY TREASURER.—*Misappropriation of Funds.—Sureties on Official Bond.—Liability.*—Where a city treasurer loans funds of the city under the direction of the city council, and takes notes therefor approved by the council, payable to him as treasurer, the sureties on his bond are liable for the interest collected for which he has failed to account.

From the Madison Circuit Court.

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Hunt *et al.* v. The State, *ex rel.* City of Anderson.

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*H. D. Thompson*, for appellants.

*E. B. Goodykoontz* and *F. P. Foster*, for appellee.

BERKSHIRE, C. J.—This was an action brought in the court below against the appellant Hunt and his sureties upon his official bond as the treasurer of said city.

Several specifications of error are assigned, but, if upon the whole case as presented in the record, we find that a correct conclusion has been reached, it will not be necessary for us to take up and consider the specifications of error *seriatim*. After carefully reading the record we are satisfied that a right result was attained in the trial court, and, therefore, its judgment should be affirmed.

The following facts are established beyond controversy :

1. The appellant Hunt, as the treasurer of said city, had in his hands of the funds of said city the sum of \$10,000.
2. The city council determined to loan said money for the benefit of the city, and through two of its members a loan was negotiated with one John W. Lovett at four per cent. per annum.
3. After said loan had been agreed upon, the said city council approved of two promissory notes presented to them for approval, one for the sum of \$4,500, and another for the sum of \$5,500, payable at different dates, and signed by the said John W. Lovett and two other persons, his sureties, and ordered and directed the said appellant to accept said notes and make said loan ; all of which proceedings of said city council were duly recorded in the records of its proceedings.
4. That afterwards the said appellant made the said loan pursuant to the directions of said city council and accepted said notes, which were made payable to the "treasurer of the city of Anderson, Indiana."
5. That after the said notes came into his hands, the appellant recognized them as a part of the financial resources of the city, by his reports made to the city council, and by the manner in which he kept his accounts with the city.



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The State v. Robbins.

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6. That on account of said loan, the said appellant collected the interest sued for and has not accounted for the same.

Whether or not the appellant could have refused to make the loan as instructed by the city council, or could have made it on his individual account and independent of the city council, are not questions arising in the record. Let it be conceded, by way of argument, that the appellant could have made the loan upon his own individual responsibility, taking notes therefor payable to himself, and that he would then have been entitled to the usufruct. This he did not do. He loaned the money under the direction of the city council and took the notes which the council had approved, not payable to Andrew T. Hunt, but to the "treasurer of the city of Anderson." He could not make a loan of city funds in his official capacity which would enure to his individual benefit; his official acts belonged to the city of which he was an officer, and whatever benefits were derived therefrom enured to the city. The money sued for being money coming into his hands in his official capacity, the appellant and his sureties are liable on their bond therefor.

There was no error in overruling the motion to modify the judgment, for the reason that it appears from the record that the interest paid on the \$4,500 was still in the hands of the appellant when the bond in suit was executed.

Judgment affirmed, with costs.

Filed June 17, 1890.

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No. 15,107.

## THE STATE v. ROBBINS.

GAMING. — *Gaming Implements.—Seizure of by Sheriff.—Order of Court.*—  
Gaming devices seized and taken into the possession of the sheriff at the time of making the arrest of one charged with unlawfully keeping and exhibiting gaming implements for gain, are subject to the order of

24	308
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the court the same as if taken by virtue of a search warrant in the hands of a constable, and afterwards delivered to the sheriff.

**SAME.**—*Gaming Apparatus.*—*Summary Destruction of.*—Unless articles seized are of such a character that the law will not recognize them as property entitled as such to its protection under any circumstances, they can not be summarily destroyed without affording the owner an opportunity to be heard upon the subject of their unlawful use, and to show whether or not the articles are intrinsically useful or valuable for any other purpose than gambling, or whether their only recognized value and customary use are as implements for gaming.

**SAME.**—*Order for Destruction of Gaming Implements.*—*Application for.*—*When Must be Made.*—*Jurisdiction.*—The application for the order for the destruction of the gaming devices seized must be made before or at the time the judgment is pronounced. After having pronounced final judgment the court has no jurisdiction to enter upon an inquiry concerning the character of the property, and make an order for its destruction.

From the Cass Circuit Court.

*L. T. Michener*, Attorney General, *J. W. McGreevey*, Prosecuting Attorney, *D. H. Chase* and *J. H. Gillett*, for the State.

**MITCHELL, J.**—Upon information of the prosecuting attorney within and for the county of Cass, Sydney Robbins was arrested upon the charge of unlawfully keeping and exhibiting for gain, and for the purpose of winning money thereon, a roulette table and wheel, and a faro table and box for dealing cards, contrary to the provisions of section 2086, R. S. 1881.

The sheriff took the defendant into custody upon a warrant, upon which the officer made return, among other things, that he had seized one faro table complete, and one roulette table complete, adding that he had seized the devices above named on sight, while a game was in progress. The defendant appeared in court on the 10th day of May, 1889, and pleaded guilty, and a fine of \$25 was assessed against him. Afterwards, on the 27th day of May, 1889, the prosecuting attorney moved the court for an order directing the sheriff to destroy the gaming apparatus or devices theretofore seized

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The State v. Robbins.

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and remaining in the possession of the officer. Thereupon Robbins appeared and moved the court for an order directing the sheriff to return the property to him. The court overruled the motion of the prosecutor, and ordered that the property be returned to the owner. From these several rulings this appeal is prosecuted by the State.

It is provided in section 2086, in substance, that whoever keeps or exhibits for gain, or to win or gain money, any gaming table, or any apparatus, device, or machine of any kind or description, for the purpose of betting or gaming, shall be fined, etc. Provision is made in the code regulating criminal procedure, whereby upon proper affidavit justices of the peace are authorized to issue warrants to search any house or place for, among many other things, "any gaming table, establishment, device, or apparatus kept or exhibited for the purpose of unlawful gaming," etc. It is provided when the warrant is executed by the seizure of the property or things described therein, that the property or things shall be delivered by the justice to the sheriff, to be securely held by him "subject to the order of the court trying the offender," and upon conviction of the person offending, the sheriff shall forthwith destroy, or cause to be destroyed, the apparatus, devices, etc., used for unlawful purposes; and as to all other property, "he shall, after such conviction, deliver the same, under the order of the court trying the offender, to the proper owner thereof."

On behalf of the State it is insisted that it was the duty of the court to order the destruction of the gaming devices, for the unlawful keeping and exhibition of which the owner had been convicted, and which had been taken by the sheriff, in whose custody they remained.

We have no doubt of the authority of a sheriff, or other officer authorized to make arrests, to seize articles which he knows, or has good reason to believe, are being employed in violating the criminal law, or as instruments for the commission of crime. Things which may supply evidence of

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an offence of which one has been accused may be taken into the possession of the officer making the arrest, to be disposed of under the direction of the court. 1 Bishop Crim. Proc., sections 210, 211. An officer has no authority to take money from the person of a prisoner, or to take from him any other property or thing, unless it is in some way connected with the crime with the commission of which he is charged, or unless it renders his arrest or detention hazardous, or might facilitate his escape. It is not only the right, but it is the duty of every peace officer to seize any property or thing that is being used in the commission of crime, or in the violation of law enacted for the protection of the health, morals and welfare of the community. *Spalding v. Preston*, 21 Vt. 9.

The gaming devices in question having been lawfully seized and taken into the possession of the sheriff, they were as properly subject to the order of the court trying the offender as they would have been in case they had been seized by a constable armed with a search warrant, and afterwards turned over to the sheriff. The statute authorizing the issuance of search warrants was designed as a means of discovering and securing possession by the officers of the law of articles or things the use or exhibition of which was immoral and unlawful.

If, without resorting to the statute, the proper officer of the court obtained possession of the articles, or things, used in the commission of a crime, in some other manner equally lawful and legitimate, the jurisdiction of the court over the subject would be the same as if it had been first taken by a search warrant, and turned over to the sheriff. In other words, so far as the court has jurisdiction over the property or thing, its jurisdiction depends upon the fact that the apparatus shall be properly in the custody of the sheriff, when the offender is before the court for trial, and not that he shall have obtained the custody by means of a search warrant. The material part of the statute in that regard is, that the

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thing seized shall be securely held by the sheriff, subject to the order of the court trying the offender. No definite, or precise mode of procedure is pointed out by the statute in order to enforce the forfeiture of the things seized. The provision is that the sheriff shall securely hold the articles seized, "subject to the order of the court trying the offender," and, upon conviction of the person offending, destroy, or cause to be destroyed, the articles used for unlawful purposes.

The inquiry then is, was it necessary in order to warrant the destruction of the property that an order to that effect should have been made by the court, and if it was, had the court jurisdiction to make it after the case was ended? It is fundamental that no person can be deprived of any article, which is recognized by the law as property, without a judicial hearing, after due notice. No degree of misconduct, or wrong, can justify the forfeiture of the property of a citizen, except in pursuance of some judicial procedure, of which the owner shall have notice, and in which he shall have the opportunity to contest the ground upon which the forfeiture is claimed. *Lowry v. Rainwater*, 70 Mo. 152 (35 Am. Rep. 420); *People v. Copely*, 4 Crim. Law Mag. 187; 8 Am. & Eng. Encyc. of Law, 1081.

There are, however, some articles which can not be kept, exhibited, or used for any lawful or innocent purpose, such as spurious coin or bills, obscene pictures, books or prints, and other articles or devices, the exhibition, use, or possession of which, in any form, and under all circumstances, is unlawful or corrupting, and prejudicial to public morals or health. Such articles are regarded as nuisances *per se*. Property can not exist in them, and an officer into whose hands they come may be authorized by statute, or ordinance, to destroy them summarily, without process. It has been held, however, that such articles can not be destroyed by an officer in the absence of a law, or ordinance, authorizing their destruction. *Ridgeway v. West*, 60 Ind. 371.

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There are other articles which are not in and of themselves nuisances, which may be used for an illegal or immoral purpose, and which may yet be regarded as property. It may be a question whether implements or articles seized, in a particular case, are honest, lawful tools, or things for innocent amusement, or whether they are devices for counterfeiting, burglar's tools, or apparatus for gambling. Differences of opinion may arise as to the character of books or prints. As has been said: "Pictures and illustrations, that might be considered unobjectionable in scientific and philosophical treatises upon medicine and surgery, might be highly indecent and immoral if intended for public circulation. Some of the finest works of art in painting and sculpture, though greatly admired by artists and critics, might be considered by a portion of the community as wholly improper for public exhibition." *Attorney General v. Justices, etc.*, 103 Mass. 456.

In many instances property may or may not exist in a thing, according to the use to which it is, or may be applied, or the purpose for which it is kept or exhibited, or the intrinsic value of the materials out of which it is constructed. Gaming apparatus may be made of valuable material, capable in some other form of being applied to useful and lawful purposes, or it may be used for innocent and harmless amusement in the form in which it exists. It can not always be determined by inspection, or declared as matter of law, that articles used for the illegal and immoral purpose of gaming, may not also be used for innocent and lawful purposes, or that in honest hands they may not constitute lawful merchandise. Unless, therefore, articles seized are of such a character that the law will not recognize them as property, entitled as such to its protection, under any circumstances they can not be summarily destroyed without affording the owner an opportunity to be heard upon the subject of their unlawful use, and to show whether or not the articles are intrinsically useful or valuable for any other

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The State v. Robbins.

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purpose than gambling, or whether their only recognized value and customary use are as implements for gaming.

If upon inquiry by the court trying the offender it should appear that the property seized is such as is of no substantial or practical use or value except in connection with a gambling-room, or if the use to which it is customarily devoted by the owner is unlawful gaming, its destruction should be ordered upon application to the court, as part of the judgment in the case, provided the defendant be found guilty; and as to all other property seized, that is such as is adapted to a lawful use, it should be ordered returned to the owner, in accordance with the provisions of section 1623, R. S. 1881; *Commonwealth v. Gaming Implements*, 119 Mass. 332; *Attorney General v. Justices, etc., supra*.

This last section, so far as applicable to gaming apparatus or devices, is to be construed in connection with section 2086. When so construed it is apparent that the inquiry in respect to the character of the property seized, and "the order of the court trying the offender," referred to in section 1623, must be made by the court before or at the time final judgment is pronounced against the defendant. The destruction of the implements employed in the commission of the crime must be regarded as, in some sense, a part of the penalty to be adjudged by the court against the offender, and the order of forfeiture must be part of the judgment pronounced in the case. After the penalty has been assessed, and final judgment has been pronounced, and the case ended, the court can not again take jurisdiction upon a mere motion, and proceed with another hearing, and make another order enforcing punishment in the nature of an additional penalty against the defendant or his property.

The conclusion follows that, after having pronounced final judgment, the court had no jurisdiction to enter upon an inquiry and make an order for the destruction of the articles seized. The application should have been made before, or at the time, judgment was pronounced. The order for the

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 Weddell *et al.* v. Hapner.
 

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destruction of the property was, therefore, correctly refused, for the reason that it was made too late.

The judgment is affirmed.

Filed June 7, 1890.

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No. 14,301.

WEDDELL ET AL. v. HAPNER.

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**EASEMENT.—Surface Water.—Rights of Adjacent Owners.**—A land-owner, who by means of ditches and drains concentrates surface water, and by that means carries it where it was not accustomed to flow, and discharges it on a lower land-owner, is liable for the payment of the damage caused thereby.

**SAME.—Damages.**—In such case the plaintiff is entitled only to compensatory damages.

From the Elkhart Circuit Court.

*W. H. Vesey* and *C. W. Miller*, for appellants.

*J. H. Baker* and *F. E. Baker*, for appellee.

**COFFEY, J.**—This was a proceeding in equity to enjoin the continuance of a nuisance and to recover damages.

The appellee in his complaint alleged, in substance, that he was the owner and in possession of a certain tract of land containing eighty acres, in Elkhart county, Indiana; that the appellants owned certain other lands adjoining the same on the north; that there was a natural elevation extending north and south, which caused all the water accumulating on the appellants' land lying east of said elevation to flow back from the direction of appellee's land; that on September 1st, 1886, the appellants unlawfully and wrongfully constructed a ditch or drain through said elevation, and also constructed lateral ditches and drains so as to empty on appellee's land, by means of said ditches and drains, large quantities of water from the east side of said elevation;



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Weddell *et al.* v. Hapner.

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that appellants, by so wrongfully constructing said ditches and drains, have caused a great quantity of water to flow almost continuously from that time to the time of bringing this suit, over and upon the appellee's land, injuring and destroying the crops of corn, wheat and grass, and causing the cellar of appellee's residence to become filled with water to the depth of four feet, injuring the walls and destroying the contents thereof, overflowing his door-yard and barn-yard, and depriving him of the enjoyment of his property to his damage, etc. Prayer for an injunction and for damages.

Upon issue formed, the cause was tried by the court which made a special finding of the facts and stated its conclusions of law thereon.

The special finding of facts, in so far as it affects the right of action, does not differ materially from the complaint. The case made by the complaint and special finding of facts falls clearly within the rule settled by the adjudicated cases of *Templeton v. Voshloe*, 72 Ind. 134, *Cairo, etc., R. R. Co. v. Stevens*, 73 Ind. 278, *Weis v. City of Madison*, 75 Ind. 241, *City of Evansville v. Decker*, 84 Ind. 325, *Chambers v. Kyle*, 87 Ind. 83, *City of Crawfordsville v. Bond*, 96 Ind. 236, and *Rice v. City of Evansville*, 108 Ind. 7.

While it is true that the owner of land may improve it either by changing the surface or by the erection of buildings or other structures thereon, so as to cause water accumulating thereon by rains and snows falling on the surface to stand in unusual quantities on other adjacent land, or pass into or over the same in greater quantities or in other directions than they were accustomed to flow, or may elevate or depress his land, thus changing the flow of surface water, as adjudged in the cases of *Taylor v. Fickas*, 64 Ind. 167, and *Weis v. City of Madison, supra*, it is also true that he can not by means of drains and ditches concentrate surface water and by that means carry it where it never flowed before and discharge it on to a lower land-owner to his damage, without becoming liable for the payment of such damage.

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The Franklin Bank of Cincinnati v. Severin.

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The court did not err in its conclusion of law upon the facts found.

The evidence tends to support the special finding of facts, except as to the amount of damages. The amount of damages proven on the trial of the cause did not exceed \$17.74, while the court assessed the damages at \$50. The facts in this case do not bring it within the class which authorizes the assessment of punitive or exemplary damages. The appellee was entitled to recover compensatory damages only, which could not exceed the amount proven on the trial. The damages assessed by the circuit court are excessive.

If the appellee will remit \$32.27, within thirty days from this date, the judgment will be affirmed, at his costs, otherwise it is reversed, with directions to grant a new trial.

Filed May 15, 1890.

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No. 14,176.

THE FRANKLIN BANK OF CINCINNATI v. SEVERIN.

**BILL OF EXCHANGE.**—*Agreement Without Consideration to Release Acceptor.*—

*Answer Alleging.*—An agreement without consideration by the assignee of a bill of exchange to release the accommodation acceptor is void. In an action against the acceptor by the assignee an answer which sets up such an agreement is bad.

From the Dearborn Circuit Court.

N. S. Givan, for appellant.

OLDS, J.—This was an action by the appellant against the appellee on a bill of exchange, dated at Cincinnati, October 21st, 1881, drawn by the Eureka Iron Roofing Company, payable to the order of the drawer in sixty days after date, for the sum of \$325, directed to and accepted by the appellee, Julius Severin, and indorsed by the Eureka Iron

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The Franklin Bank of Cincinnati v. Severin.

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Roofing Company to the appellant, for a valuable consideration, before maturity, and duly protested for non-payment, and notice thereof duly given.

The complaint is in the usual form, alleging the indorsement to the plaintiff for a valuable consideration before maturity.

The appellee answered in two paragraphs. The first is a general denial. The second alleges that on the 26th day of December, 1881, the plaintiff released the defendant from any and all liability of, and on account of, said acceptance, and on said day agreed to look to the drawer of said acceptance for the payment thereof; that the defendant was, and is, an accommodation acceptor on said acceptance, and that before and at the time the plaintiff purchased said acceptance, and paid the money therefor, and bought the same, it well knew that the defendant was an accommodation acceptor; that plaintiff at no time after the 26th day of December, 1881, called on defendant for payment; that the Eureka Iron Roofing Company, the drawer of said acceptance, continued to do business with the plaintiff, and in the city of Cincinnati, up to February, 1883, and was solvent; that at the time of said release the drawer had money in the bank of plaintiff sufficient to pay said acceptance, and the defendant, relying on the release, made no effort to collect said acceptance from the maker, and made no effort to indemnify himself, which he could have done; that the Eureka Iron Roofing Company has become insolvent, and ceased to exist.

Plaintiff demurred to the second paragraph of answer for want of facts, and the court overruled the demurrer, to which ruling the plaintiff excepted, and assigns the ruling as error.

The question is presented as to the sufficiency of this paragraph of answer. The paragraph admits the plaintiff to be a purchaser for value before maturity, and avers a release of the defendant from liability on the bill of exchange without any consideration.

The acceptor of a bill of exchange becomes, as to all

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The Franklin Bank of Cincinnati v. Severin.

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parties other than the drawer, the principal debtor. It is the universally recognized doctrine that it is no defence to a bill by an assignee for value against an accommodation acceptor, that the assignee knew he was an accommodation acceptor at the time of purchasing the bill. 2 Randolph Commercial Paper, section 561; *Spurgin v. McPheeters*, 42 Ind. 527.

As between the holder for value and the acceptor, the bill represents a valid indebtedness, and at the time it is alleged that the plaintiff released the defendant, the defendant was indebted to the plaintiff to the amount of the bill, and an agreement to release the defendant from such indebtedness and liability on the same, without any consideration for such promise, would be invalid. It would be the same as an agreement to release the maker of a promissory note from the payment of the same without any consideration, and it has been held by this court that an agreement to release a maker of a promissory note from payment of the same without any consideration for the release, is void. *Harris v. Boone*, 69 Ind. 300; *Carter v. Zenblin*, 68 Ind. 436.

The answer in this case fails to show that there was any consideration for the release pleaded; indeed, it affirmatively appears from all of the allegations in the paragraph that there was no consideration for such agreement, and the agreement is void, and of this the parties were bound to take knowledge, and it was the duty of the acceptor to take steps to secure or protect himself if he desired to do so. He would have had the right at any time to have paid the bill and sued the drawer.

The sufficiency of the paragraph of answer depends upon the validity of the agreement of the holder to release the acceptor. There being no consideration for such agreement, it was not valid in law, and did not operate to release the acceptor, and the acceptor was bound to know the release was invalid, and that he was still holden for the payment of the bill; hence it was his own lack of diligence if he did not in-

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Leslie v. Boyd.

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demnify himself against loss, or pay the bill and collect it of the drawer while the drawer was solvent.

The court erred in overruling the demurrer to the second paragraph of answer, and for this error the judgment must be reversed.

The other errors assigned may not arise on a retrial of the cause, and it is therefore unnecessary to pass upon the other questions presented.

Judgment reversed, at costs of appellee, and the cause is remanded to the circuit court, with instructions to sustain the demurrer to the second paragraph of answer, and for further proceedings not inconsistent with this opinion.

Filed June 7, 1890.

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No. 14,346.

LESLIE v. BOYD,

**REAL ESTATE.—Broker.—Commission.—Contract of Agency.—Construction of.**—A contract of agency for the sale of land provided for a broker's commission of 5 per cent. on the amount of the consideration. It was further provided that "If said real estate is transferred, or sold, outside of the influence or agency of said Leslie, or withdrawn from the market within twelve months from this date I agree to pay said Leslie a commission of 2 per cent. If a customer is introduced through the agency of said Leslie, and a sale is afterwards consummated with said customer I agree to pay the commission aforementioned, whether the time of this agreement shall have expired or not."

**Held,** that the principal had the right to withdraw his real estate from the market, or to sell it to a purchaser not furnished by the agent, in which case he would have been liable for a commission of 2 per cent.; but that having done neither, and having sold to a purchaser furnished by the agent after the expiration of a year, he was liable for the commission of 5 per cent., the contract being a continuing one until terminated in some manner provided for by the contract.

From the Daviess Circuit Court.

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Leslie v. Boyd.

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*W. R. Gardiner and S. H. Taylor, for appellant.*  
*J. W. Ogdon and F. B. Burke, for appellee.*

BERKSHIRE, C. J.—The complaint in this case is in one paragraph. The court below sustained a demurrer thereto, and the appellant, refusing to amend his complaint, final judgment was rendered for the appellee upon the ruling on the demurrer.

The complaint is in substance as follows: The appellee, by his certain written obligation, a copy of which is filed, employed and authorized the appellant, as his agent, to bargain and sell certain real estate owned by the appellee; that during the existence of said agency the appellant advertised said land for sale, and brought the same into market, and through the agency of the appellant, on the 1st day of August, 1886, the appellee and one Finnicum were brought together, and, pursuant thereto, the appellee consummated a sale with said Finnicum, and sold and conveyed said land, on the 16th day of August, 1886; that the consideration paid therefor, by said Finnicum, was \$2,160, or \$18 per acre, and by reason thereof the appellee became indebted, etc.

The contract so far as we need quote from it is as follows:

"I, Joseph M. Boyd, of the county of Daviess, State of Indiana, have this day employed and empowered Alexander Leslie of Washington, Indiana, as my agent to bargain and sell for me, execute bond (in my name) for a title, as my agent, receive and receipt for money paid on the following described real estate situated in the county of Daviess, State of Indiana:" (here follows a description of the real estate) "One hundred and twenty acres, more or less. In the event of a sale through his agency, I agree to pay said Leslie a commission of five per cent. on the amount of the consideration, \$18 per acre. If said real estate is transferred or sold outside of the influence or agency of said Leslie or withdrawn from the market within twelve months from this

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Leslie v. Boyd.

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date, I agree to pay said Leslie a commission of two per cent. on the sum of \$18 per acre. Terms of sale: One-third cash, the remainder in three equal annual payments, running one, two and three years from date of sale, said notes to bear interest at the rate of six per cent., and all of said back payments to be secured by mortgage on said property. Commission due and payable when sale is made. If the said Leslie produces a purchaser at the price and the terms as above, and I fail to complete the title, I agree to pay him full commission. It is agreed and understood by the undersigned that the commission and the excess, with attorney's fees, shall stand as a lien against the above described property until the same are paid. If a customer is introduced through the agency of said Leslie, and a sale is afterwards consummated with said customer, I agree to pay the commission aforementioned whether the time of this agreement shall have expired meanwhile or not.

"Witness my hand and seal this 21st day of April, A. D. 1885.

JOSEPH M. BOYD."

In our opinion, under the averments in the complaint there was a good cause of action stated.

We understand from briefs of counsel that the court construed the contract as only continuing for the period of one year, and at the end of that time, though the appellee may have made a sale to a purchaser introduced by the appellant, the appellee was not bound to pay the commission.

We do not so construe the contract. The duration of the contract is not fixed by its terms; at any time within one year from its execution the appellee had the right to withdraw his real estate from the market, or to sell it to a purchaser not furnished by the appellant, and had he done either he would have been liable to pay a commission of two per cent.; but he did neither.

After the time named had elapsed, the agency of the appellant still continued.

Suppose the appellant had sold the real estate upon the

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Leslie v. Boyd.

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terms named in the obligation, and executed a bond as therein provided, after the year had terminated would not the appellee have been compelled to execute the contract? And if not, why not? We can imagine no legal excuse upon which to have rested a refusal. Until the termination of the agency, either by sale or by the act of the appellee, as provided in the contract the appellant's authority to make the sale continued.

The agency was a continuing one until terminated in some manner known to the contract.

It is probable that the appellee had the right under the contract to terminate the agency after one year from the date of the contract, without liability except as in the last clause of his obligation. But, if he had done so, had a purchaser thereafter appeared and purchased the property of the appellee, his introduction being the result of the services and influence of the appellant, in advance of the termination of the agency, the said last named clause of said obligation would have rendered the appellee liable. This is so by its very terms: "If a customer is introduced through the agency of said Leslie, and a sale is afterwards consummated with said customer, I agree to pay the commission aforementioned, whether the time of this agreement shall have expired meantime or not."

The case of *Williams v. Leslie*, 111 Ind. 70, fully supports our conclusion.

Judgment reversed, with costs.

Filed June 17, 1890.



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No. 14,963.

BEAVER ET AL. v. THE STATE, EX REL. HEASTON,  
AUDITOR.

COUNTY TREASURER. — *Fictitious Items of Account. — Liability for Money Actually Received from Predecessor.*—The amount with which a county treasurer was charged was made up of fictitious items instead of the true item—money received from his predecessor on account of a certain gravel road fund.

*Held*, that the treasurer must account for the money actually received notwithstanding such error in making up the items of the charge.

From the Grant Circuit Court.

*J. C. Branyan, M. L. Spencer, L. P. Milligan, O. W. Whitelock, B. M. Cobb, C. W. Watkins, W. H. Charles, T. L. Childs, G. W. Harvey, L. D. Baldwin and H. J. Paulus*, for appellants.

*E. C. Vaughn, J. B. Kenner and J. I. Dille*, for appellee.

ELLIOTT, J.—The complaint is founded on a bond executed by Henry Beaver and his sureties to secure the performance by Beaver of the duties of treasurer of Huntington county. The dispute is as to an item of twelve thousand dollars which the relator claims is due from Beaver, and for which it is alleged he has failed to account. The special finding of facts made by the trial court is quite full, but it is unnecessary to state the facts at much length, since it is conceded that Beaver did receive twelve thousand dollars from his predecessor in office, Daniel Christian, and that he is chargeable with that amount. As we understand counsel for the appellants, their contention is that he has accounted for the amount received from Christian, but that he has been wrongfully twice charged with the amount, thus making it appear that he owes twelve thousand dollars, whereas he, in fact, is not in debt to the county in any amount. It is true that the record shows that Beaver was charged with twelve thousand dollars in an erroneous mode, in this, that the

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*Beaver et al. v. The State, ex rel. Heaston, Auditor.*

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amount was made up of fictitious items instead of the correct one, namely, the amount received from Christian. But, while it is true that the items of the charge were not the true ones, inasmuch as the true item was the twelve thousand dollars received by Christian on account of what was called the Stutt's Gravel Road Fund, and by him paid to Beaver, and not the fictitious items stated; still, it is also true that Beaver did receive twelve thousand dollars on account of the Stutt's Gravel Road from Christian. For this sum he has not accounted, and he remains liable for it.

The fact that the charge was not made, as it should have been, for the money received from Christian, does not exonerate Beaver. As he did, in fact, obtain the sum of twelve thousand dollars belonging to the public funds, he must account for it, notwithstanding the error in making up the items of the charge. If the fictitious items be eliminated the ultimate result is unaffected, for the real item must be charged against Beaver, so that the amount of the charge against him is, in the end, unchanged.

There is evidence sustaining the finding of the trial court that Beaver was properly charged with the sum of twelve thousand dollars, the final result, therefore, is right, and as this is true a reversal would not be authorized even if there were intervening errors. But we think the facts stated in the special finding sustain the conclusions of law. The court explicitly states that Beaver made no charge against himself of the sum he received from Christian, so that, although he may have been charged with fictitious items instead of the true one, still, the conclusion that he must account for what he actually received is correct. Nor can it be justly claimed that there is anything in the special finding that warrants the inference that Beaver was charged more than once with the same amount, for it is found that he was not charged with the amount he did actually receive from Christian.

The case has been twice tried, and in each trial the result was adverse to the appellants, and we can not say that it ap-

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Griffin v. The Ohio and Mississippi Railway Company.

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pears that the conclusion is wrong. It is incumbent upon the appellants in such a case as this to make it clearly appear that the judgment of the trial court was erroneous, and this these appellants have not done; on the contrary, it seems to us that the finding is right on the evidence.

Judgment affirmed.

Filed April 11, 1890; petition for a rehearing overruled June 17, 1890.

124 326  
129 333

124 326  
130 350

124 326  
132 344  
133 241

124 326  
134 637  
134 640

124 326  
137 210  
137 309  
139 687

124 326  
143 386

124 326  
152 400  
152 551

124 326  
156 182

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No. 14,366.

GRIFFIN v. THE OHIO AND MISSISSIPPI RAILWAY COMPANY.

**MASTER AND SERVANT.**—*Injury to Employee in Gravel Pit.—Assumption of Risk.*—Where an employee at work in a gravel pit, while engaged in digging a bed of gravel from under a thin stratum of clay is injured by the falling of the clay, there can be no recovery from the master. The employee in such a case takes upon himself the dangers incident to the work, and is bound to know that when the earth is undermined it will fall in.

From the Dearborn Circuit Court.

*G. M. Roberts* and *C. W. Stapp*, for appellant.

*H. D. McMullen* and *W. R. Johnston*, for appellee.

**COFFEY, J.**—This was an action by the appellant against the appellee to recover damages on account of a personal injury suffered by the appellant at a gravel pit.

It appears from the complaint that the appellant was employed by the appellee to assist in loading gravel upon its gravel train to be distributed along the line of its road. The bed of gravel in which the appellant was employed to work was nearly twenty feet in thickness, covered by a stratum of clay between four and five feet in thickness. The gravel was loaded upon the cars by means of a large shovel at-

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Griffin v. The Ohio and Mississippi Railway Company.

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tached to a crane, by which it was scooped from near the base of the bed. The crane not being long enough to scoop all the gravel from its base to the clay on top, that above its reach was gouged and spaded out by means of long picks and spades used by the employees of the appellee. When the gravel was thus picked and spaded out it caused the clay covering the same to cave and fall down. While engaged in excavating the gravel by filling in the sink occasioned by the scoop, after each load, the appellant was injured by the falling of the clay covering such gravel, within three hours after he commenced work.

It is alleged that the appellee did not notify appellant of the danger attending such work by reason of the caving in and falling of the clay covering the gravel, and that he had no knowledge or notice of such danger, and that his injury occurred by reason of the carelessness and negligence of the appellee in not warning him of the danger and how to escape therefrom, and in not warning him of the manner of such excavating and the danger resulting therefrom, and how to detect and escape such danger, and in not having any sufficient means of giving such warning. At the time of the injury the appellant was twenty-one years old.

The court below sustained a demurrer to the complaint, and this ruling is assigned as error.

It has been too long settled to admit now of controversy that when a servant enters upon an employment which is, from its nature, necessarily hazardous, he assumes the usual risks and perils of the service. In such cases it is held that there is an implied contract on the part of the servant to take all the risks fairly incident to the service, and to waive any right of action against the master resulting from such risk. *Atlas Engine Works v. Randall*, 100 Ind. 293; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Beach Cont. Neg.*, p. 8; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440. The master in such cases impliedly agrees not to subject

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Griffin v. The Ohio and Mississippi Railway Company.

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the servant, through fraud, negligence or malice, to greater risks than those which fairly and properly belong to such particular service.

Where one seeks to recover damages on account of an injury occasioned by the negligence of another, it should, ordinarily, appear that the injured party exercised caution proportioned to the danger likely to be encountered. *Lake Shore, etc., R. W. Co. v. Pinchin*, 112 Ind. 592; *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476; *Cones v. Cincinnati, etc., R. W. Co.*, 114 Ind. 328; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31.

Where the danger is alike open to the observation of all, both the master and servant are upon an equality; and the master is not liable for an injury resulting from the dangers of the business. *Porter v. Hannibal, etc., R. R. Co.*, 71 Mo. 66; *Beach Cont. Negligence*, 140; *Vincennes, etc., Co. v. White, post*, p. 376.

In this case the appellant was engaged in digging a twenty-foot bed of gravel, from under a thin stratum of common earth. He was bound to know that when the earth was undermined it would cave and fall in, and that if he was under it at the time it fell it would fall upon him.

We are bound to take notice of the law of gravitation, and to know that a heavy object will not remain up in space without some support.

The averments in the complaint that appellant did not know, and could not have known, that the earth covering the gravel would fall when undermined, can not prevail against the well-known laws of nature. The appellant was bound to use the faculties with which he was endowed, and had he done so he would have known that at some time in the process of undermining the earth it would fall and endanger his personal safety. This case is one where the appellant took upon himself the dangers incident to the business in which he was engaged, and being an adult the rules applicable to the employment of infants of tender years have

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Smith v. Holloway.

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no application. In our opinion the appellant was not entitled to recover under the facts stated in his complaint, and the court did not err in its ruling on the demurrer to the complaint.

Judgment affirmed.

Filed June 17, 1890.

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No. 14,245.

SMITH v. HOLLOWAY.

**EASEMENT.**—*Right of Way.*—*Grant of.*—*Ownership of Streams, Etc.*—The grant of a right of way to a railroad company being the grant only of an easement, the owner of the fee remains the owner of springs, streams, and minerals. Subject to the use of the right of way, he may make all lawful use of the land.

**SAME.**—*Parol Reservation of Water Right.*—*Statute of Frauds.*—A parol agreement reserving to the grantor the right to use the water of a stream which runs across the land granted for the purpose of a road, is not void under the statute of frauds; the right to the water remaining in the grantor, he is, by the agreement, but confirmed in his existing legal right.

From the Pike Circuit Court.

*J. W. Wilson* and *E. A. Ely*, for appellant.

*F. B. Posey*, for appellee.

**ELLIOTT, J.**—The appellee alleges in his complaint that in August, 1869, he was the owner of a tract of land; that prior to that date he granted a right of way for the construction of a railroad to the Evansville, Indianapolis and Cleveland Railroad Company; that the company constructed an embankment; that on the day named he conveyed to Granville Carlisle all of the tract lying south and east of the right of way; that by a series of conveyances the defendant became the owner of the parcel conveyed to Carlisle; that, on the 15th day of August, 1885, the appellee sold to the ap-

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Smith v. Holloway.

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pellant a strip of land for a road fifteen feet in width; that there is a spring from which a stream of water constantly flows; that this stream crosses the strip granted the appellant, and runs along the south line of the embankment and into the enclosed land of the appellee; that, on the 1st day of June, 1885, an agreement was made between the appellee and the appellant, under which they erected a partition fence on the top of the embankment; that for more than fifteen years before the agreement was entered into the appellee had used and enjoyed the stream; that it was agreed that the appellee's right to have the stream flow into his field should never be disturbed; that the partition fence should never be so changed as to interfere with the appellee's use of the stream; that he continued to use the stream, and the flow thereof was uninterrupted until the 1st day of July, 1887, but on that day the appellant, against the protest of the appellee, so changed the fence as to shut off the field and pasture of the appellee from the stream; that the wrongful act of the appellant has caused the appellee to suffer damages in the sum of one hundred and fifty dollars. This complaint was challenged for the first time by a motion in arrest of judgment, so that the question for decision is as to the sufficiency of the complaint after verdict.

The point made by the plaintiff that the grant of the right of way to the railroad company precludes the appellee from maintaining this action is without substantial merit. The owner of the fee remains the owner of springs, streams, minerals, and the like, for all that he grants is an easement. The owner can not interfere with the free use of the right of way, but subject to this use he may make all lawful use of the land.

The point made by the appellant that the parol agreement relied upon is invalid under the statute of frauds, is one of more difficulty, but as the complaint shows that the strip granted the appellant was for the purpose of a road, we can not say that the agreement reserving the water right was not

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 Loeb et al. v. Tinkler.
 

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valid, for, upon the principle stated, the right to the water remained in the appellee as the owner of the fee. As the water right remained in him the parol agreement did no more than confirm in him an existing legal right.

We can not disturb the finding upon the evidence.

Judgment affirmed.

Filed June 17, 1890.

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 No. 14,113.

LOEB ET AL. v. TINKLER.

124	331
147	572

**MORTGAGE.** — *Foreclosure.* — *Description.* — *Cross-Complaint.* — A cross-complaint which refers to the complaint for a description of the real estate upon which the mortgage is sought to be foreclosed is sufficient as against an assignment of error.

**SAME.** — *Strict Foreclosure.* — *Junior Judgment.* — *Purchaser Under.* — The purchaser under the foreclosure of a senior mortgage is entitled to a strict foreclosure as against the wives of purchasers at a sale on execution issued on a judgment junior to the mortgage, who were not made parties to the foreclosure.

124	331
167	405

From the Tippecanoe Circuit Court.

J. F. McHugh, for appellants.

OLDS, J. — This is an action brought by the appellants against the appellee for the partition of certain real estate described in the complaint.

The appellee answered the complaint by general denial, and filed a cross-complaint, alleging that, on the 11th day of May, 1874, one James T. Moore executed a mortgage to one Consider Tinkler upon the real estate described in the complaint, said Moore being then the owner of the said real estate, to secure the payment of two promissory notes aggregating the sum of \$673.65; that said mortgage was duly acknowledged and recorded in Mortgage Record 16, on page



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*Loeb et al. v. Tinkler.*

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449, of said county, on the 16th day of June, 1874; that afterwards said note and mortgage were assigned to said Emily A. Tinkler, the appellee, by endorsement; that afterwards, on December 14th, 1881, one Henry Rosenthal recovered a judgment in the Tippecanoe Circuit Court against said Moore for \$123.25; that, on March 8th, 1882, a writ of execution issued on said judgment; that a levy was made on said real estate described in the complaint, and, after being duly advertised, was sold to Gus Loeb and Lazarus Hirsh on June 5th, 1883, they being the highest and best bidders therefor; that afterwards, on the — day of —, 1884, the sheriff of said county made and executed and delivered to said purchasers a deed for said real estate.

It is further averred that, on the 9th day of June, 1884, the appellee brought suit for the foreclosure of said mortgage against said James T. Moore as mortgagor, and said Gus Loeb and Lazarus Hirsh as subsequent purchasers; that she recovered a judgment and was granted a decree of foreclosure against all of said parties; that an order of sale was issued on said decree; that said real estate was duly sold, and she became the purchaser, and the real estate not being redeemed the sheriff of said county executed to her a deed. And it is further averred that said Ada Loeb is the wife of Gus Loeb, and Sarah Hirsh is the wife of Lazarus Hirsh, and that they were not made parties to said foreclosure proceedings. Prayer for a decree of strict foreclosure against said Ada Loeb and Sarah Hirsh.

Appellants answered the cross-complaint by general denial, and the cause was submitted to the court for trial without the intervention of a jury. The parties made an agreed statement of facts, which was entered of record in the cause, no evidence being introduced, but all the facts were agreed upon.

The agreed statement of facts is, substantially, as alleged in the cross-complaint: That Moore owned the real estate in controversy and described in the complaint and cross-com-

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Loeb *et al.* v. Tinkler.

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plaint; that he executed a mortgage on the same to Consider Tinkler, and he assigned it to the appellee; that it was duly recorded; that after the execution of the mortgage the judgment was recovered against Moore, execution issued thereon and levied upon the land, and the land sold and purchased by Gus Loeb and Lazarus Hirsh; the land not being redeemed a deed issued to them; that after the deed issued in pursuance of the sale on execution to Loeb and Hirsh, the appellee brought suit to foreclose the mortgage against Moore and Gus Loeb and Lazarus Hirsh, and obtained a judgment and decree of foreclosure; that an order of sale issued thereon, the land was sold, and appellee became the purchaser, and afterwards received a deed; that Ada Loeb is the wife of Gus Loeb, and Sarah Hirsh is the wife of Lazarus Hirsh.

The court stated conclusions of law, and rendered a judgment and decree of strict foreclosure in favor of appellee, giving the appellants sixty days to redeem.

Numerous errors are assigned, but the only one that presents any question is that the cross-complaint does not state facts sufficient to constitute a cause of action.

No demurrer was addressed to the cross-complaint, and it is questioned for the first time in this court. The same rule does not apply in testing the sufficiency of a complaint or cross-complaint, in this court, on an assignment of error that the complaint does not state facts sufficient to constitute a cause of action, as in case of a demurrer for this cause.

In the case of *Peters v. Banta*, 120 Ind. 416, it is said by the court: "When the sufficiency of a cause of action is called in question by motion in arrest of judgment, or by error assigned in this court, if facts sufficient are alleged to bar another suit for the same cause of action, all other defects are cured by the verdict and the complaint will be regarded as sufficient to uphold the judgment." *Colchen v. Ninde*, 120 Ind. 88.

In the case of *Owen School Tp., etc., v. Hay*, 107 Ind. 351, the court say: "For want of a copy of the contract the

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Loeb *et al.* v. Tinkler.

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complaint is defective, but that defect would have been cured by a verdict, and was cured by the finding of the court."

The only objection urged to the complaint is, that it does not describe the real estate, and does not set out a copy of the mortgage. The cross-complaint, as will be seen, refers to the complaint for a description of the real estate. The real estate is described in the complaint. While it would be defective if tested by a demurrer, as no such reference is permissible in good pleading, yet by such reference a description of the real estate can be ascertained, and facts are alleged which would bar another action.

In *Chapell v. Shuee*, 117 Ind. 481, it is held that if the omission be such as might be supplied by proof, and the facts alleged are sufficient to bar another suit for the same cause of action, the complaint is sufficient to withstand a motion in arrest.

In *Murdock v. Cox*, 118 Ind. 266, it is held that if two paragraphs of a complaint, when taken together, state a cause of action, it is sufficient after verdict, though not sufficient as against a separate demurrer to each paragraph.

Tested by the rules stated in the authorities cited, the complaint is sufficient as against an assignment of error, as in this case.

It is contended that the appellee is not entitled to a strict foreclosure. The appellee had obtained the legal title of the mortgagor in the land, and the appellants had only the right of redemption by reason of their marital relations with the purchasers, at a sale on execution issued on a judgment which was junior to the mortgage; and not having been made parties to the suit to foreclose the mortgage, the appellee had the right to a strict foreclosure against them. See *Jefferson v. Coleman*, 110 Ind. 515, and authorities there cited. There is no error in the record.

Judgment affirmed, with costs.

Filed April 9, 1890; petition for a rehearing overruled June 18, 1890.

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Snyder, Mayor, *et al.* v. The State, *ex rel.* Fleming.

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No. 15,197.

## SNYDER, MAYOR, ET AL. v. THE STATE, EX REL. FLEMING.

**ASSIGNMENT OF ERRORS.**—*Names of Parties Must be Given in Full.*—The assignment of errors must contain the names of the parties to the cause in full. The assignment of errors is the appellant's complaint, and the only parties before the Supreme Court, or over whom it acquires jurisdiction, are those whose names appear therein.

From the Jay Circuit Court.

*W. H. Williamson, T. Bosworth and F. H. Snyder*, for appellants.

*D. T. Taylor, R. H. Hartford, J. B. Jaqua and J. A. Jaqua*, for appellee.

MITCHELL, J.—William S. Fleming, as relator, instituted a proceeding in the Jay Circuit Court against the mayor and common council of the city of Portland, to compel that body by mandate to accept the proposal of, and award the contract for, a certain street improvement to Judson A. Jaqua, who, it is alleged, submitted the lowest and best bid for the work in pursuance of notice duly given. The court overruled a demurrer to the complaint, and the defendants refusing to plead, judgment was given accordingly. From this judgment an appeal was taken, which appellee moves to dismiss.

The sixth rule of this court requires that "the assignment of errors shall contain the full names of the parties." In the assignment of errors the parties are thus designated: "State of Indiana, on relation of William S. Fleming, Appellee, *vs.* Frank H. Snyder, Mayor, *et al.*"

This is in total disregard of the rule above referred to, and of the many decisions made in the enforcement of it. The assignment of errors is the appellant's complaint, and the only parties before this court, or over whom it acquires jurisdiction, are those whose names appear therein. *Thoma v.*

124	335
132	107
124	335
139	191
139	500
124	335
141	701
124	335
148	554
124	335
159	421
124	335
162	139
162	686

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O'Ferrall v. Van Camp.

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*State*, 86 Ind. 182, and cases cited; *Bacon v. Withrow*, 110 Ind. 94; *Calvert v. State*, 91 Ind. 473.

The motion to dismiss must be sustained. Appeal dismissed.

Filed June 18, 1890.

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No. 14,205.

O'FERRALL v. VAN CAMP.

**SALE.—By Car Load.—Substitution of Larger Cars.—Construction of Contract.**

—The plaintiff contracted with the defendant to sell and deliver to him twelve car loads of fruit cans, to be shipped in B. & O. freight cars, the number to be shipped in each car not being agreed upon. To lessen the freight expense to the defendant larger cars were procured.

**Held**, that the defendant was entitled to receive under the contract only a sufficient number of cans to fill twelve of the smaller cars.

From the Marion Superior Court.

*R. Denny and J. R. McFee*, for appellant.

*D. V. Burns and A. Seidensticker*, for appellee.

**BERKSHIRE, J.**—The appellant, as plaintiff below, recovered judgment at special term in the sum of \$298.05 and costs.

From the judgment thus obtained the appellee appealed to general term, and in general term the judgment at special term was reversed, and from the judgment of reversal this appeal is prosecuted.

The action was brought to recover the price of certain merchandise which the appellant alleges he sold and delivered to the appellee.

The appellee, in addition to his answer to the complaint, filed a counter-claim, to which the appellant filed a reply.

The cause being at issue was submitted to the court for trial, and at the request of the appellee the court returned a special finding.

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O'Ferrall v. Van Camp.

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From the facts found the court stated as its conclusions of law that the appellee was indebted to the appellant in the sum of \$298.05, and that judgment should be rendered for the appellant in that sum, together with costs.

The appellant excepted to the conclusions of law, and moved the court for judgment upon the facts found in the sum of \$838.85, together with interest thereon from August 10th, 1879, which exception and motion were overruled by the court, and exceptions reserved. d.

The appellee moved the court for a new trial, which motion the court overruled, and to the said ruling he saved an exception.

The court thereupon rendered judgment in favor of the appellant for the sum of \$298.05.

There seems to be no dispute as to the sale and delivery of the merchandise named in the complaint, nor as to the price which the appellee agreed to pay therefor. The controversy arises upon the counter-claim filed by the appellee, which alleges a contract between the parties, pursuant to which the said merchandise was sold and delivered, and a breach of the contract on the appellant's part, whereby the appellee was greatly damaged, and because of which he demands judgment.

In general term the several judges delivered separate opinions, each reaching a different conclusion from his associates, except that two of them agreed that the judgment at special term should be reversed.

The different conclusions to which the superior judges arrived depend upon the construction placed by each upon the special finding of facts and the effect of the evidence as it appears in the record.

The appellant, though dissatisfied at the time with the judgment rendered at special term, is now asking a reversal of the judgment in general term, and an affirmance of the judgment at special term.

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O'Ferrall v. Van Camp.

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The appellee contends that in fixing the amount of the appellant's recovery the court at special term included in its computation by mistake, and to the prejudice of the appellee, two items of \$95.25 each, there being, as he contends, but one such item proved, and prefers to have the judgment at special term affirmed, less \$95.25, if this can be done.

We think it probable that there was a double charge of \$5.25, a \$90 item by inadvertence being taken by the trial judge for a \$95.25 item.

In view of the rule which has long prevailed in this court, we can not consider the weight of the evidence before the trial court. After having carefully considered the evidence with a view to ascertain whether or not the finding is supported by sufficient evidence, we are not prepared to say that it is not.

We come next and last to the special finding of the court. From the facts stated in the special finding the appellant, subject to certain terms and conditions to be performed by the appellee, obligated himself to deliver to the appellee twelve car loads of fruit cans, six car loads to be furnished in June, 1879, and six car loads not later than August 10th, following. The time of delivery of the six car loads last named was afterwards by agreement of the parties extended, but this fact is not material to the conclusion to which we have arrived. The number of cans to be placed in each car was not agreed upon, but the character of the cars in which the cans were to be transported was agreed upon; they were to be shipped in B. & O. freight cars. Afterwards, for the accommodation of the appellee who was to pay the cost of transportation, the appellant consented to procure cars which would hold a greater number of cans than B. & O. freight cars, and he shipped six car loads in larger cars, and the seventh car load in a B. & O. car. Under the contract as made, the whole number of cans sold by the appellant to the appellee was a number equal to twelve times what one B. & O. freight car would reasonably hold, and from the special

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O'Ferrall v. Van Camp.

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finding we ascertain this number to be 27,040; the number of cans sold, therefore, was 324,480; of this number 206,475 cans were transported in the six larger cars, and 27,040 in the one B. & O. car, in all 233,515. When we deduct 233,515, the number of cans delivered, from 324,480, the number sold, we find the remainder to be 90,965. We have not overlooked the fact that the court states that under the contract the appellee was still entitled to 135,200 cans. This we regard as more in the nature of a conclusion of law than the statement of a fact, notwithstanding it appears as the statement of a fact and not as a conclusion of law. But there is nothing in the facts stated to support this conclusion; indeed it is a conclusion in opposition to the facts as given. The court does find that when the appellant consented as an accommodation to the appellee to procure larger cars the latter contemplated that he was to receive twelve car loads notwithstanding the size of the cars, but it is also stated that the appellant contemplated that when he had shipped seven of the larger car loads his contract was fulfilled. But no difference what may have been the understanding of either party, there could be no change in the contract until the minds of the parties came together and assented thereto. We are, therefore, unable to understand the *data* from which the court reached the conclusion that there were yet due to the appellant 135,200 cans.

We have not considered the question as to who was first in default in the performance of the conditions of the contract, for the reason that if it was the appellee it can not help the appellant in view of the conclusion to which we have arrived; and the court below having visited all of the consequences of a breach of the contract upon the appellant.

The conclusion reached at special term was that the appellant had broken the contract and was chargeable with damages for the breach, and reduced the amount which he would otherwise have been entitled to recover in the sum of \$540. This was on the basis that the appellee was dam-



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Cullen *et al.* v. Strauz.

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aged in the sum of \$4 per 1,000 for each one 1,000 cans which he failed to get under the contract, and that he was entitled to 135,000 cans more than he received. But under the contract, as we have seen, he was only entitled to receive 90,965 cans, which at \$4 per 1,000 would amount to \$363.86 and when deducted from \$838.85, the amount which the appellant should have recovered but for his default in performing the contract, would leave \$474.99; and if it is conceded, as contended by the appellee, that there is an error in the computation of the court in the sum of \$95.25 there will still remain \$379.74, which exceeds the amount for which judgment was rendered, in the sum of \$81.69.

The judgment at general term is reversed, with costs, with directions to the court in general term to affirm the judgment at special term.

ELLIOTT, J., took no part in the decision of this case.

Filed April 23, 1890; petition for a rehearing overruled June 18, 1890.

124	840
129	84
124	840
161	380

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No. 14,361.

CULLEN ET AL. v. STRAUZ.

**DRAINAGE.—Ditch Assessments.—Delinquency.—Tax Sale.—Purchaser's Lien.**

—A ditch tax, for which a certificate had been issued, was placed upon the tax duplicate, under section 4305, R. S. 1881, in August, 1883, at which time the State and county taxes against the land were delinquent. In the December following the owners of the land paid the delinquent State and county taxes, but failed to pay the ditch tax; whereupon the land was advertised and sold for the ditch assessment.

*Held*, that the ditch tax, which was due immediately upon the issuance of the certificate, became delinquent upon the first Monday of November, 1883, and that the sale transferred to the purchaser the lien of the tax.

**SAME.—Damages.**—In such case the purchaser is entitled to a decree for the sale of the land to satisfy the lien, the amount of taxes subsequently paid, with the statutory interest and penalty.

From the Pulaski Circuit Court.

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Cullen *et al.* v. Strauz.

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*N. L. Agnew and B. Borders*, for appellants.

*W. Spangler and H. A. Steis*, for appellee.

COFFEY, J.—This was an action by the appellee against the appellants to quiet title to the land described in the complaint.

The cause was tried by the court, which found the facts specially, and stated its conclusions of law thereon.

It appears from the special finding that the appellant Margaret Cullen is the owner of the land described in the complaint. In the month of August, 1883, there became due from her a certain sum as a ditch assessment, for which a certificate was duly issued, and the amount due from her was placed upon the tax duplicate for collection as other taxes. At the time the ditch assessment was placed upon the duplicate, the State and county taxes against said land were delinquent. In the month of December, 1883, the appellants paid the State and county taxes, but failed to pay the ditch tax. The land was advertised and sold for the ditch assessment.

The circuit court stated as a conclusion of law upon the facts found that the sale and the deed made in pursuance thereof were not sufficient to convey title to the land, but that they were sufficient to convey to the purchaser the lien for such taxes. Thereupon the court proceeded to ascertain the amount due at the time of the sale, as well as the amount due for taxes subsequently paid, and entered a decree for the sale of the land in controversy for the payment thereof.

The appellants claim that at the time of the sale the ditch tax was not delinquent, and that, consequently, the sale was without authority of law, and was void, and did not transfer to the purchaser the lien for such tax.

Section 4305, R. S. 1881, found in the act providing for the construction of public ditches, provides that "It shall be the duty of the county surveyor, on being notified by any contractor that his job is completed, to inspect the same; and

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Cullen *et al.* v. Strauz.

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if he find that it is completed according to contract, he shall accept it, and give to the contractor a certificate of acceptance, stating that said job \* \* is completed according to the specifications of said ditch. And if any share or allotment has been sold to a person not the owner of the land assessed therefor, he shall, in addition, state the amount due the contractor for constructing the same from the owner of said land; which certificate shall be a lien upon the land assessed for such share or allotment, and shall be due and payable immediately by the owner of the land; and such certificate, if not paid on demand, shall draw interest until paid. \* \* \* And when the county surveyor accepts it, and issues his certificate of acceptance, he shall file with the county auditor a copy thereof; whereupon said auditor shall charge the amount mentioned in said certificate on the tax duplicate against the land assessed with such allotment, to be collected as other taxes are collected, together with six per cent., for the holder of the certificate, after the same becomes delinquent; and when collected it shall be paid to the person holding the certificate, on an order of the auditor."

In the cases of *Storms v. Stevens*, 104 Ind. 46, *Lockwood v. Ferguson*, 105 Ind. 380, and *Brosemer v. Kelsey*, 106 Ind. 504, it was held that the mode of collection prescribed by this section was exclusive, and that no action could be maintained to recover the amount due for the cost of constructing a ditch, under the statute of which this section constitutes a part. In the latter case it was held that the provisions of section 6488, R. S. 1881, and Acts of 1883, p. 95, sections 2 and 3, were applicable in case of the sale of the land against which the assessment was made for the non-payment of such assessment. Section 6488, *supra*, provides that "If any conveyance for taxes shall prove to be invalid and ineffectual to convey title because the description is insufficient, or for any other cause than the first two enumerated in the preceding section, the lien which the State has on such lands shall be transferred to and vested in the grantee, his heirs and

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Cullen *et al.* v. Strauz.

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assigns, who shall be entitled to recover from the owner of such land the amount of taxes, interest, and penalty legally due thereon at the time of sale, with interest, together with the amount of all subsequent taxes paid, with interest; and such lands shall be bound for the payment thereof."

It is contended by the appellants, however, that the assessment could never become delinquent until the provisions of section 6417, R. S. 1881, and the succeeding sections had been complied with, and that there could be no sale until a delinquency had occurred.

We are not inclined to adopt this view. It was not intended by the law-making power that a ditch assessment should pass through all the formalities incident to an ordinary tax before it could be enforced by a sale of the land against which it was assessed. This is perfectly plain by an examination of the statute providing for the construction of public ditches. Section 4305, *supra*, provides, as we have seen, that the certificate issued to the contractor by the surveyor shall be due and payable by the owner of the land immediately. The owner of the land has notice of all the proceedings during their pendency before the board of commissioners, and must know that the law requires him to pay the assessment against his land immediately upon the completion of the work; and he must know, also, that in the event he fails to pay, it will be placed upon the tax duplicate for collection by the county treasurer. This tax was placed upon the tax duplicate in the month of August, 1883, at which time the State and county taxes against the land were delinquent. In December of that year the appellants paid the delinquent State and county taxes. The ditch tax was due before it was placed upon the duplicate, and should have been paid, and we are of the opinion that upon a failure of the appellants to pay it on or before the first Monday of November, 1883, as required by the provision of section 6426, R. S. 1881, it became delinquent. Being delinquent, it was the duty of those charged with its collection to advertise and

sell the land against which it was charged, for its payment.

It is, finally, contended by the appellants that the court erred in the assessment of the damages, the same being too large.

The amount allowed by the court was the amount paid at the sale, and the amount of taxes subsequently paid, with the statutory interest and penalties. The appellee was entitled to recover this sum. *City of Logansport v. Case, ante*, p. 254.

The court did not err in its conclusions of law.

Judgment affirmed.

Filed June 18, 1890.

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No. 13,779.

WILLIAMS v. LEWIS ET AL.

**PLEADING.—Demurrer.**—A demurrer to a complaint assigning for cause that the complaint does not state facts sufficient to constitute a cause of action, does not present the question of the sufficiency of the complaint on the ground of another action pending.

**REPLEVIN.—Demand.—Failure to Prove.—Subsequent Action.**—Where the plaintiffs in an action of replevin do not succeed merely because of failure to prove a demand prior to the time of bringing the action, the judgment rendered against them is not conclusive, and is not a bar to a subsequent action.

**SAME.—Demand.—Proof.**—In the second action it is not competent for the defendant to prove that a demand was in fact made prior to the first action of replevin.

From the Switzerland Circuit Court.

W. R. Johnston and L. O. Schræder, for appellant.

W. D. Ward, for appellees.

**ELLIOTT, J.**—The material allegations of the second paragraph of the appellees' complaint are these: That at the

time the present action was brought there was an action pending between these parties; that the present appellees in that action sought to set aside a sale of the personal property involved in this controversy made by the marshal of the city of Vevay, and to enjoin the appellant from interfering with the property; that the appellant put in issue in that action his ownership and his right to the possession of the property; that he asserted ownership under the marshal's sale, and also upon a judgment rendered in his favor in an action of replevin brought against him by the appellees; that in the action brought by the appellees to enjoin the appellant from asserting title under the marshal's sale a decree was rendered in their favor, and it was adjudged that they were the owners of the property, and that the appellant be enjoined from interfering with the appellees' rights to the possession and enjoyment of the property; that subsequent to the judgment in replevin rendered in favor of the appellant the appellees demanded the possession of the property, but the appellant refused to deliver possession and claimed to hold it as owner.

The paragraph of the complaint of which we have given a synopsis was filed after the action was commenced, and the pleading as originally filed was an ordinary complaint for the possession of personal property. The appellant argues that the court erred in overruling a demurrer to the second paragraph of the complaint, for the reason that it shows on its face that at the time this action was commenced there was another action pending involving the same property and the same transactions which are involved in the present action. If we should agree with appellant's counsel upon the general proposition advanced by them, we could not hold that the question which they argue is presented. The demurrer assigns for cause that the complaint does not state facts sufficient to constitute a cause of action, and this assignment does not present the question which the appellant's counsel argue. The code designates the causes for demurrer, and

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Williams v. Lewis et al.

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the third cause is that "there is another action pending between the same parties for the same cause" (section 339, R. S. 1881), and in order to present the question argued, the appellant should have assigned that cause. 1 Works Practice, 312.

It appears from the finding of facts made by the court in the action of replevin in which the appellant was successful that the marshal's sale under which he asserted title was invalid, and that no demand was made by the appellees for the property. The conclusions of law stated by the court show that the appellees failed in that action because they did not show a demand prior to the time the action was brought. It appears, therefore, upon the face of the record that the judgment in the action of replevin was not upon the merits, for the defeat of the appellees was owing to their omission to prove a demand. The judgment in that action was not conclusive, and the appellees are not barred. *Roberts v. Norris*, 67 Ind. 386.

It was not competent for the appellant to prove that there was in fact a demand made prior to the first action of replevin, and the trial court did right in excluding the evidence offered upon that point. Whether such a demand was or was not made is immaterial in view of the fact that the judgment in the first action was given solely because the plaintiffs failed to prove a demand. Nor can it be important what the fact actually was, for as there was a failure of proof which produced a judgment not determining the merits there was no former adjudication. If, however, it be conceded that there was a former adjudication the case is even stronger against the appellant, for it is expressly found and adjudged that there was no demand, and this certainly, must conclude the parties upon that isolated question, if they are concluded upon any question arising in the controversy.

Judgment affirmed.

Filed June 18, 1890.

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 Skehan v. Rummel.
 

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No. 14,358.

## SKEHAN v. RUMMEL.

124	341
158	309
158	542

124	347
158	600
158	601

**CONTRACT.**—*Excuse for Non-Performance.*—Where one of the parties to a contract asks its enforcement against the other party, he must be able to show performance on his part, or to offer a legal excuse for his failure to perform.

**SAME.**—*Account.*—*Interest.*—One who has delayed for an unreasonable time payment of his account may be properly charged with interest thereon.

From the Madison Circuit Court.

*R. Lake*, for appellant.

*W. A. Kittinger* and *L. M. Schwinn*, for appellee.

**BERKSHIRE, C. J.**—This was an action upon an open account for merchandise sold and delivered.

The appellant, who was the defendant in the court below, filed an answer in general denial and a counter-claim. To the counter-claim the appellee filed a reply, and the cause being at issue it was submitted to the court for trial, and a finding having been returned for the appellee, over a motion for a new trial, judgment was rendered in accordance with the finding.

The only error assigned is that the trial court erred in overruling the motion for a new trial.

The motion states but two causes for a new trial: 1. The finding is not sustained by sufficient evidence. 2. The finding is contrary to law.

There is no contention that the finding is contrary to law in any other respect than that the court should have reached a different conclusion from the evidence before it, hence there is really but one question before us for consideration, and that is, is there sufficient evidence to support the finding?

After a critical examination of the evidence as we find it in the record, we are led to the conclusion that it is ample to sustain the court's finding.

Conceding that the appellant had a contract such as he



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*Skehan v. Rummel.*

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claims with the appellee, in what situation do we find the parties?

The contract was made May 12th, 1882. On that day the appellant ordered four kegs of gunpowder, and received it July 31st, 1882. The price of this shipment was \$25. Afterwards he ordered five hundred pounds of Hercules powder, and received it August 8th, 1882. The price of this shipment was \$145. Still later he ordered five hundred pounds more of Hercules powder, and, on the 15th of November, 1882, he received five hundred pounds of commercial powder, which he returned May 22d, 1883.

There is nothing in the evidence to show what was a reasonable time in which to make a shipment after receiving the order, and the appellant made no complaint to the appellee because there was not greater promptness in making the shipments. The only complaint or objection which he made was as to the quality of the powder covered by the last shipment.

We are therefore forced to the conclusion that there was no breach of the contract on the appellant's part until he made the last shipment, and then only because he shipped commercial instead of Hercules powder.

By the terms of the contract the appellant was to pay for the powder at the end of sixty days after each shipment; for the shipment July 31st, payment was due September 31st, 1882; and for the shipment August 8th, payment was due October 8th, 1882.

Neither of these bills was paid when this action was commenced, January 11th, 1888.

From what we have said it follows that the appellant first violated the contract, and is not therefore in a condition to enforce it against the appellee.

It is familiar law that where one of the parties to a contract asks its enforcement against the other party thereto, he must be able to show performance on his part, or to offer a legal excuse for his failure to perform.

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 Whipperman *et al.* v. Dunn *et al.*


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The appellant having delayed payment for an unreasonable length of time, it was proper for the court to charge him with interest, and after giving him credit for sums paid on account of freights, which we think he was entitled to, the amount for which judgment was rendered is not too great.

We find no error in the record.

Judgment affirmed, with costs.

Filed June 18, 1890.

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 No. 13,737.

121	349
139	231

### WHIPPERMAN ET AL. v. DUNN ET AL.

**MORTGAGE.—*Sheriff's Sale.*—*Assignment by Mortgagee of Certificate of Purchase.*—*Rights of Assignee.*—**Where a mortgagee who holds a certificate of purchase of the mortgaged premises, sells and assigns the certificate, the assignee thereof acquires all the rights of the assignor under the certificate, and his title to the debts secured by the mortgage, and the fact that the assignee does not pay the full amount of the purchase-money does not prevent the title from passing to the assignee. Hence the assignor can not, after the year of redemption has expired and a deed has been issued to the assignee, maintain an action for the reformation and foreclosure of the mortgage.

**JUDGMENT.—*Lien.*—*Prior Equities.*—**The lien of a judgment creditor is subject to all the equities existing against the land at the date of the rendition of the judgment.

**NEW TRIAL.—*When will be Ordered.*—**Where it appears that justice can not be done between the parties without a new trial as to the whole case, the court will order a new trial of all the issues.

**PLEADING.—*Demurrer.*—*Defect of Parties.*—**A demurrer on the ground that a cross-complaint does not state facts sufficient to constitute a cause of action presents no question as to defect of parties.

From the Cass Circuit Court.

*D. H. Chase*, for appellants.

*D. P. Baldwin*, *T. S. Rollins* and *D. C. Justice*, for appellees.

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*Whipperman et al. v. Dunn et al.*

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COFFEY, J.—It appears from the complaint in this cause that, on the 14th day of February, 1874, William Thackery and wife executed to the appellee John Dunn a mortgage upon the land therein described to secure the payment of a note of \$400, at ten per cent. interest, which mortgage was duly recorded. On the 15th day of July, 1875, said Thackery and wife executed to said Dunn another mortgage upon the same land to secure another note for the sum of \$190, at ten per cent. interest, which mortgage was duly recorded. Thackery failing to pay either of said notes, Dunn instituted suit in the Cass Circuit Court to recover a judgment on the \$400 note, and the foreclosure of the mortgage executed to secure the same, and to obtain a judgment on the \$190 note.

This suit was commenced on the 8th day of September, 1876, to which the appellee Newsome, Peter D. Herr, Henry Herr and Kendall West were made parties defendants. Such proceedings were had in that suit that, on the 20th day of February, 1877, the appellee Dunn recovered judgment on both said notes for the aggregate amount of \$870.08, being \$648.70 on the first, and \$221.38 on the second note. The court also entered a decree foreclosing the mortgage executed to secure the \$400, as to all the defendants in said action.

Upon a certified copy of this decree the appellee Dunn bid in the mortgaged premises for the sum of \$965.90, on the 27th day of June, 1877, that being the full amount of his judgment on both said notes together with the interest and costs thereon.

At the time the decree of foreclosure was entered, the said Kendall West held a judgment against the said Thackery for the sum of \$105, and costs, which was subsequently assigned to James M. Justice. On the 24th day of June, 1878, the appellee Dunn assigned said certificate of purchase to the said Justice, and endorsed thereon the following assignment:

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"I hereby assign this certificate to James M. Justice, without recourse. June 24th, 1878.

"JOHN DUNN."

It is averred in the complaint that at the time of said assignment Justice claimed the right, by reason of owning the West judgment, to redeem from the sale made to Dunn without the payment of the sum of \$221.28, the amount represented by the last note upon which Dunn's judgment was based, and, therefore, it was "agreed that Dunn should assign to Justice the certificate upon payment of \$965.90, at 10 per cent. interest for one year, less the sum of \$221.28, the amount of the judgment upon this note; and it was further agreed that, as to that sum, if it should be decided that Dunn was entitled to hold the property theretofore, to wit: the property included in said certificate, and secured by said mortgage, to wit: 'for \$221.28, Justice should deliver to Dunn therefor his note with approved security, or good unincumbered real estate at fair value for said \$221.28, and interest. This agreement was in writing, but being lost, or mislaid, a copy can not be filed herewith.'" Justice, upon the delivery of the assigned certificate, paid to Dunn the amount bid for the land therein described, with ten per cent. interest thereon from the date of sale, less said sum of \$221.28. Justice now refuses to pay said sum, denying that the same is due under the terms of said agreement. At the expiration of the year for redemption Justice took a sheriff's deed on said certificate for the land therein described.

The land covered by the mortgage securing the \$400 note, and the decree under which it was sold, is described in said mortgage and decree as follows:

"The five acres of land situated in the southeast quarter of section two (2), township twenty-six (26) north, of range one (1) east, and lying at the intersection of the Michigan road and the section line bounding said southeast quarter on the north, together with the steam saw-mill and appurtenances thereto belonging, and being the same land hereto-

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fore conveyed by D. C. Richardson to James Chappelow, and by James Chappelow to said Thackery and one John Kirkham, and by said John Kirkham to said Thackery. Also, the west half of lot number ten (10), in the subdivision of a tract of land purchased of Henry Heath and Mary Ann Heath, his wife, by the Catholic church, the same being a part of a lot of land allotted to the said Mary Ann Heath by the name of Mary Ann Barron, as her portion of a section of land granted to the children of Joseph Barron, by the treaty between the United States and the Pottawattomie Indians, on the 16th day of October, 1826; the said half of said lot hereby mortgaged containing one-half an acre."

In the mortgage executed to secure the \$190 note, the first tract is described as above set out.

The second tract is described as follows: "Also the west half of lot number ten (10) of the subdivision of a tract of land purchased by the Catholic church from Harvey and Mary Ann Heath, being a portion of Barron's reserve, and containing one acre."

It is averred in the complaint that there was a mutual mistake in said mortgages, in the description therein contained, and that it was the intention of the parties to mortgage and describe the following land in Cass county, to wit: "That part of the southeast quarter of section two (2), township twenty-six (26) north, of range one (1) east, commencing at a post in the center of the Michigan road, on the open line running east and west through the center of said section; thence due east on said section line seven (7) chains and six (6) links to a post—witness, a beech tree 18 inches in diameter, bearing south six (6) degrees thirty-four (34) links to a red elm thirty-six (36) inches in diameter, bearing south thirty-four degrees (34°) west, thirty-six (36) links; thence south seventeen (17°) degrees and thirty (30') minutes west seven (7) chains and six (6) links to a post; thence due west seven (7) chains and six (6) links to a post in the center of the Michigan road; thence north seventeen (17°) degrees

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*Whipperman et al. v. Dunn et al.*

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and thirty (30') minutes east along the center of said road seven (7) chains and six (6) links to the place of beginning." The second tract is also described by metes and bounds.

It is averred that upon the execution of the sheriff's deed Justice took possession of the mortgaged premises under it, and has ever since been in possession, taking the rents, issues and profits arising therefrom.

The appellee Dunn prayed an accounting for the rents and profits, and a reformation and foreclosure of the mortgage executed to secure the \$190 note, and a sale of the mortgaged premises for the payment of the amount found due thereon.

The court overruled a demurrer to this complaint, and the appellants excepted.

The assignment of error calls in question the correctness of this ruling.

The complaint is drawn and proceeds upon the theory that the sheriff's sale under which the appellants claim title is void, by reason of the defect in the description of the land attempted to be sold, and upon the theory that the appellee Dunn is still the owner of the judgment not covered by the mortgage securing the \$400 note.

It is the rule that where the description of land sold upon an execution, or by virtue of a decree of foreclosure, is so defective as to convey no title, where the execution plaintiff is the bidder, he may have the apparent satisfaction of his judgment or decree set aside and have a new execution. This rule rests upon the principle that there is no consideration for the satisfaction, and he is not, in good conscience, bound thereby. *Kercheval v. Lamar*, 68 Ind. 442.

Where there has been a decree of foreclosure entered upon a mortgage containing an imperfect or an erroneous description, the mortgagee is not precluded from bringing an action to reform his mortgage, and from foreclosing it as reformed.

*Conyers v. Mericles*, 75 Ind. 443; *Armstrong v. Short*, 95 Ind. 326; *Burkam v. Burk*, 96 Ind. 270.

But we think it unnecessary to inquire, in this case, as to whether the descriptions contained in the mortgage to the appellee Dunn, and decree and sale thereunder, were insufficient or otherwise, as we are of the opinion that he parted with all his title to the debt secured thereby, in the sale and assignment to the appellant Justice. It can not be reasonably contended that when the appellee sold to the appellant the certificate of purchase, he sold only the paper upon which the rights of the parties were apparently fixed, for it must be presumed that it was the intention of the one to sell and of the other to purchase something that was substantial. Doubtless it was the intention of the parties to vest in the purchaser the right to take title to land attempted to be described in the certificate, in the event it was not redeemed within one year from the date of sale. If the description was so imperfect as to render this impossible, still we think by virtue of the purchase and assignment the purchaser acquired all the rights in the debts described in the certificate at that time held by the appellee Dunn. *Seller v. Lingerman*, 24 Ind. 264; *Muir v. Berkshire*, 52 Ind. 149.

Had the land been redeemed by the judgment debtor the next hour after the assignment of the certificate, under the allegations found in the complaint, it can not be doubted that the appellant would have been entitled to the redemption money. The fact that the appellant did not pay the full amount of the purchase-price for the certificate did not prevent the title from passing to the assignee. It is plain from the averments in the complaint that it was the intention of the parties that the title should pass, to the end that the appellant might take a deed on the certificate, leaving the question as to the payment of the balance of the purchase-price to be determined by a future event. As the title to the debt due from Thackery to the appellee Dunn passed to the appellant Justice by the assignment, Dunn can not

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maintain this action. *Muir v. Berkshire, supra*, and authorities there cited.

If it is desirable to reform the mortgages executed to secure these debts, the action must be brought by the appellant and not by the appellee. The appellee's remedy, if he has not been paid in full for his certificate, is against the appellant upon his contract, and not against Thackery on the mortgage.

The circuit court erred in overruling the demurrer to the complaint.

The appellee Newsome was made a party to the suit, and by way of cross-complaint set up a judgment in his favor against Thackery, rendered in the Cass Circuit Court on the 12th day of October, 1875, and alleged that the appellants had been in possession under their void sheriff's sale, and under mortgages executed by Thackery, and had received rents and profits, and property covered by the mortgages sufficient to pay and satisfy their claim.

On the trial of the cause the court found that there was due to the appellants the sum of \$631.80, and that there was due to Newsome the sum of \$490.80 on his said judgment; and it found and decreed that Newsome's judgment was superior to the claim of the appellants, and that upon a sale of the property involved and covered by the mortgages above set out the judgment in favor of Newsome should be first paid out of the proceeds of said sale.

This finding and decree can not be sustained. The claims allowed to the appellants consisted of the \$400 note and mortgage executed by Thackery to Dunn, on the 14th day of February, 1874, and included in the sheriff's certificate assigned to Justice, and a mortgage executed by Thackery to one Seybold, on the 25th day of October, 1869, and paid by the appellants to protect their supposed title under the Dunn mortgage.

They are prior in date to Newsome's judgment, and constitute liens on the land antedating the judgment. As we



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have seen, the appellee Justice, by the assignment to him of the sheriff's certificate, succeeded to the rights of Dunn in the debts held by him. The appellees had the right to pay off the Seybold mortgage to protect their lien on said land, and to be subrogated to the rights of Seybold in the mortgage held by him. *Jones Mortgages*, 3d ed., sections 99, 876; *Wainwright v. Flanders*, 64 Ind. 306; *Muir v. Berkshire*, *supra*; *Flanders v. O'Brien*, 46 Ind. 284.

Newsome is only a judgment creditor, and his lien is subject to all the equities existing against the land at the date of its rendition. *Wells v. Benton*, 108 Ind. 585; *Jones v. Rhoads*, 74 Ind. 510; *Hays v. Reger*, 102 Ind. 524; *Huffman v. Copeland*, 86 Ind. 224; *Koons v. Mellett*, 121 Ind. 585.

The record in this cause is quite voluminous, and other questions than those above decided have been discussed by counsel in their briefs. We have considered all the questions presented, but we think the above are the only ones which go to the merits of the controversy. The others may not arise upon another trial of this cause.

Judgment reversed, with directions to grant a new trial, to sustain the demurrer of the appellants to the complaint, and for further proceedings not inconsistent with this opinion.

Filed March 18, 1890.

#### ON PETITION FOR A REHEARING.

COFFEY, J.—The appellee Newsome has filed a petition for a rehearing in this cause, in which he insists:

*First.* That this court erred in reversing the cause as to him, because the appellants filed no motion for a new trial as to the issues involved between them and himself on his cross-complaint.

*Second.* That the cross-complaint of the appellants against him is insufficient.

One object, in common, was sought by all the parties to this suit, namely, an adjustment of the liens against the

property described in the several pleadings in the cause. The liens were adjusted by the circuit court upon the erroneous theory that those older than Newsome's judgment had been satisfied.

It is perfectly clear that justice can not be done between the parties without a new trial as to the whole case. In such cases the court will order a new trial of all the issues in the cause, to the end that justice may be done. *Bisel v. Tucker*, 121 Ind. 249; *State, ex rel., v. Templin*, 122 Ind. 235.

The first paragraph of the cross-complaint filed by the appellants against the appellee Newsome sought to have a lien held by them, anterior in date to the appellee's judgment, declared a lien superior to said judgment.

The second paragraph of said cross-complaint sets up the amount paid for necessary repairs to property upon which the liens rested.

The first objection urged to the cross-complaint is that there is a defect of parties.

The demurrer was based upon the ground that the cross-complaint did not state facts sufficient to constitute a cause of action. Such a demurrer raises no question of parties. *Dunn v. Tousey*, 80 Ind. 288; *Johnson School Tp. v. Citizens Bank, etc.*, 81 Ind. 515.

The facts stated authorized the court to decree that the lien of appellants, if they held one, was superior to the lien created by appellee's judgment.

It is contended by appellee, however, that the mistake in the description of the land covered by the mortgage set up in the cross-complaint, was a mistake of law, and not a mistake of fact. In support of this position he cites *Baker v. Pyatt*, 108 Ind. 61, *Armstrong v. Short*, 95 Ind. 326, *Easter v. Severin*, 78 Ind. 540, *First Nat'l Bank, etc., v. Gough*, 61 Ind. 147, and *Rhodes v. Piper*, 40 Ind. 369.

The case of *Baker v. Pyatt*, *supra*, is not an authority in favor of the position of the appellee. The other cases cited have been so far modified by subsequent decisions of this

## Voght v. The State.

court that they can no longer be regarded as authority upon the questions now before us. *Keister v. Myers*, 115 Ind. 312; *Calton v. Lewis*, 119 Ind. 181.

The court did not err in overruling the demurrer of the appellee to the cross-complaint of the appellants.

Petition for a rehearing overruled.

Filed June 18, 1890.

124	358
147	79

No. 14,419.

## VOGHT v. THE STATE.

**CRIMINAL LAW.—Renting Room for Gaming Purposes.—Evidence.—Statute.**

—It shall be sufficient evidence of the fact that a building or room was rented for the purpose of gaming if gaming is actually carried on therein with the knowledge of the owner, or under such circumstances that he has good reason to believe that his room is being so used, and takes no reasonable steps to restrain the occupant from continuing the unlawful use. Section 2079, R. S. 1881. Hence direct evidence to prove that there was a specific agreement or intent on the part of the lessor and his lessee at the time he leased the room that it was to be used for the purpose of gaming, is unnecessary.

**SAME.—Burden of Proof.—Statutory Presumption Affecting.—Constitutionality of Statute.**—While statutes which undertake to make proof of certain facts absolute or conclusive of guilt are unconstitutional, those which merely declare statutory presumptions affecting the burden of proof, are valid.

**SAME.—Evidence.—Competency of.**—Any evidence which tends to prove that gaming is actually carried on in the room, and that the lessor knows, or has good reason to believe that it is being carried on and suffered by his lessee, is competent as tending to prove, or raise a presumption, that the room is rented for the purpose of gaming.

**SAME.—Evidence** that it was generally reputed that the room was kept as a gambling room, and that the lessee who had been indicted had pleaded guilty to the charge of keeping a room in which gambling was permitted while occupying the lessor's room, was competent as tending to raise an inference that the lessor, who was engaged in business near by, in the same community with the lessee, knew of the facts.

**SAME.—Use by Tenant of Room for Unlawful Purpose.—Remedy of Landlord.**—The mere fact that a tenant uses premises for an unlawful purpose does

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Voght v. The State.

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not, of itself, avoid the lease; but the landlord may apply to a court of equity to restrain the tenant and to avoid or forfeit the lease.

From the Huntington Circuit Court.

*J. B. Kenner* and *J. I. Dille*, for appellant.

*L. T. Michener*, Attorney General, and *J. H. Gillett*, for the State.

MITCHELL, J.—It is provided in section 2079, R. S. 1881, among other things, that whoever being the owner of any building or room, rents the same to be used or occupied for gaming shall be fined, and in section 1815, R. S. 1881, it is declared that “It shall be sufficient evidence that any building or other place was rented for the purpose of gaming, if such gaming was actually carried on, and the owner or lessor thereof knew or had good reason to believe that the lessee suffered gaming therein, and such owner or lessor took no sufficient means to prevent or restrain the same.”

The appellant, Jacob Voght, was indicted and tried at the October term, 1887, of the Huntington Circuit Court, for having unlawfully rented his building and room to be used for gaming. After hearing the evidence a jury assessed a fine of sixty dollars against him, and from the judgment of conviction rendered upon the verdict this appeal is prosecuted.

There was evidence tending to show that the appellant rented a back room in the second story of a brick building owned by him, situate in the city of Huntington, to a Mr. Parker, ostensibly for a sleeping apartment. The lease was by parol, and was to run two years. The room had been used for gaming before Parker leased it, and the appellant had been indicted for permitting it to be so used. Accordingly he charged Parker that no gambling should be allowed by him. Parker occupied the room for three or four months, his occupancy being of an equivocal character, leading to a strong suspicion that the room was being used during that time, by his permission, for a gambling room. At the end

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of that time he sublet it to Anderson, who seems to have had no other occupation than that of gambling, for whom, circumstances tend to show, he rented it in the first place. The appellant lived two squares and a half from the room, and was acquainted with Anderson, who paid the rent to the appellant most of the time after he sublet from Parker. The room was furnished with tables, chairs, a side-board and lounge, but had in it no bed, or other conveniences for a sleeping apartment, and the evidence tends to show that it was used for no other purpose than for gambling for nearly two years before the appellant was indicted. The city marshal, the hotel keeper, and a number of other citizens, testified that it was generally reputed that the room was used for a gambling room. There was direct evidence that it was actually so used. The evidence tends to show that Anderson was twice indicted by the grand jury, at the April term, 1887, and again at the December term, 1887, for keeping a gambling establishment in the appellant's room, and that he pleaded guilty to both indictments, and was fined in each case. The appellant had other tenants in the same and other buildings, owned by him in the city of Huntington, and attended to collecting his rents himself, and mingled with the citizens of the city, so far as appears, like others of his associates. It is true he testified that he did not rent the room to Anderson; that it was specially agreed between Parker and himself that the room should not be used for gambling; that he supposed Parker was his tenant all the time, and that although he received rent from Anderson, he supposed he was paying it for Parker. He also testified that he made some repairs to the room at the request of Anderson, of whose occupancy he had knowledge, but that he did not know what the latter was doing in the room, or what use he was putting it to; that he never inquired; and that he could not recollect of having heard that Anderson was arrested for keeping a gambling house, in his room, or that he had ever heard that he was so engaged.

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It is insisted (1) that because the charge in the indictment is that the defendant rented his room to be used for gaming, the evidence tending to show the general reputation of the room, and that the occupant had been convicted of keeping a gambling house therein, or that tended to show that the appellant knew, or had good reason to believe, that his lessee suffered gaming therein, was improperly admitted; and (2) that there is no competent evidence tending to show that the appellant knew, or had reason to believe, that his room was being used for gaming.

It was not necessary to prove by direct evidence that there was a specific agreement, or intent on the part of the appellant and his lessee at the time he leased the room, that it was to be used for the purpose of gaming. It would rarely happen that such evidence could be obtained, and if direct evidence were required, the result would be that no one could ever be convicted of renting a building or room for the immoral and unlawful purpose of setting up a gambling establishment. Accordingly it has been provided in the statute above set out, that it shall be sufficient evidence of the fact that a building or room was rented for the purpose of gaming, if gaming was actually carried on therein with the knowledge of the owner, or under such circumstances that he had good reason to believe that his room was being so used.

In *Morgan v. State*, 117 Ind. 569, this statute was held to be a valid constitutional enactment. While we should unhesitatingly declare a statute void which attempted to enact that a person should be convicted of an offence upon proof of facts which might be consistent with innocence, or which attempted to make certain evidence conclusive of guilt (*State v. Beswick*, 13 R. I. 211), yet it has often been held that the Legislature, in defining a crime, may also enact that proof of facts which are universally recognized as indicating guilt shall be sufficient *prima facie* evidence of the commission of an offence defined by statute. For example, it is enacted in

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section 1817, R. S. 1881, that the failure of a public officer to account for and pay over public money which has come into his hands, shall be *prima facie* evidence of the embezzlement thereof, and other statutes declare what shall be deemed sufficient evidence in cases of rape, seduction, receiving stolen goods, obstructing highways, and the like. *Morgan v. State, supra.*

As is in effect said in *Commonwealth v. Williams*, 6 Gray, 1, these statutes only prescribe, to a certain extent, what legal effect shall be given to a particular species of evidence, if it stands entirely alone and unexplained. This neither conclusively determines the guilt or innocence of the accused, nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. The burden of proof rests upon the State to establish the accusation it makes, but the statute declares that in case certain facts tending to establish guilt, and which can not exist consistent with innocence, are proved, a certain force or effect may be attributed to those facts until an explanation is offered by the accused. *State v. Hurley*, 54 Maine, 562; *Commonwealth v. Thurlow*, 24 Pick. 374.

The constitutionality of statutes declaring that the delivery of intoxicating liquor shall be *prima facie* proof of a sale, and that a sale shall be *prima facie* proof of illegality, has been affirmed. *Commonwealth v. Wallace*, 7 Gray, 222; *State v. Higgins*, 13 R. I. 330; *State v. Mellor*, 13 R. I. 666; *State v. Thomas*, 47 Conn. 546; Whart. Crim. Ev., section 715 a.

Statutes which undertake to make proof of certain facts absolute or conclusive of guilt are unconstitutional. Those which merely declare statutory presumptions affecting the burden of proof are valid.

Any evidence, therefore, which tended to prove that gaming was actually carried on in the room, and that the appellant knew, or had good reason to believe, that it was being carried on and suffered by his lessee, was competent as tend-

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ing to prove, or raise a presumption, that the room was rented for the purpose of gaming. Whenever it is material to bring home to a party knowledge of a particular fact, it is admissible to show that the fact was generally known and talked about in the neighborhood where the party sought to be charged with knowledge resided, or that it was a matter of common reputation in the business community to which the party belonged. Whart. Crim. Ev., section 254; *Adams v. State*, 25 Ohio St. 584.

It is wholly immaterial in the present case whether Parker or Anderson, or both of them, are regarded as the lessees of the appellant, as there was ample evidence to justify the inference that both suffered the room to be used for gaming. Indeed, it does not seem from the evidence to have been devoted to any other use from the time Parker first rented it. Evidence that it was generally reputed that the room was kept as a gambling room, that the occupant Anderson was a gambler, and that he had been indicted, and that he pleaded guilty to the charge of keeping a room in which gambling was permitted while occupying appellant's room, was competent as tending to raise an inference that the appellant, an active man, looking after his own business, residing only two squares and a half away, in the community in which Anderson's acts and business were the subjects of comment, knew of the facts. Notwithstanding the appellant testified that he did not know that the room was being put to an unlawful use, the jury were fully justified in believing, from all the facts and circumstances in evidence, that he had good reason to believe that it was being so used.

The court properly admitted all the facts and circumstances in evidence, and left it to the jury to draw such inferences as seemed naturally and necessarily to grow out of the surrounding facts. The jury drew the inference that the appellant either knew, or had good reason to believe, that an unlawful use was being made of his property by his lessee, and that he took no means to restrain his tenant. They were,



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therefore, justified in drawing the further inference that the room had been rented for use as a gambling room. The owner of property who is in a situation to know the use to which it is being applied can not shut his eyes, or close his ears, and remain ignorant for nearly two years of what has become notorious among his neighbors, without some explanation of his want of information. *Graeter v. State*, 105 Ind. 271; *Pierce v. State*, 109 Ind. 535.

Having knowledge that gambling is actually being carried on in his building, our law attributes to such knowledge the same effect as if the building had been rented for the purpose for which it is thus being used, unless the landlord takes reasonable steps to restrain the occupant from continuing the unlawful use.

The mere fact that a tenant uses premises for an unlawful purpose does not, of itself, avoid the lease; but the landlord may apply to a court of equity to restrain the tenant, and to avoid or forfeit the lease. *Wood Landlord and Tenant*, section 81; *Gear Landlord and Tenant*, section 98.

What has been said disposes of all the questions discussed, and leads to the conclusion that the instructions and rulings of the court were correct.

The judgment is affirmed, with costs.

Filed May 29, 1890; petition for a rehearing overruled June 18, 1890.

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No. 15,451.

## THE STATE v. CALLAHAN.

CRIMINAL LAW.—*Forgery.—Indictment.—Forged Instrument.—When Need not be Set Out in Hæc Verba.*—Where an instrument alleged to be forged is lost, destroyed, in the hands of the defendant, or its whereabouts are unknown to the grand jury returning the indictment, such instrument need not be set out in *hæc verba*, but it is sufficient to set out the sub-

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stance and describe the instrument, and state the reason why the grand jury are unable to set it out *in hæc verba*.

*SAME.—Forged Instrument.—Reasons for not Setting out in Hæc Verba.—Statement of Disjunctively.*—The statement of two reasons laid in the disjunctive why the forged instrument is not set out *in hæc verba* does not render the indictment bad, such averments not relating to the statement of the charge, or the definition of the offence.

From the Jay Circuit Court.

*R. H. Hartford*, Prosecuting Attorney, for the State.

*O. H. Adair*, for appellee.

OLDS, J.—The appellee was indicted by the grand jury of Jay county for forgery. The indictment was in two counts. The first count was dismissed. The defendant moved to quash the second count, and the court sustained the motion, to which ruling the appellant excepted, and prosecutes this appeal, and assigns the ruling of the court in quashing the second count of the indictment as error.

Omitting the caption, the second count of the indictment is as follows:

“The grand jury aforesaid, on their oaths aforesaid, do further charge and present that the said John T. Callahan, on April 23d, 1887, at said county and State aforesaid, did then and there unlawfully, feloniously and falsely forge and counterfeit a certain promissory note for the payment of money, by then and there unlawfully, feloniously and falsely forging, counterfeiting and signing the name of John M. Henry to said false, forged and counterfeit note as one of the makers thereof, which said note was dated April 23d, 1887, due in one year after date, payable to the order of Reed & Mackenbach, calling for two hundred dollars, with eight per cent. interest from maturity, and purporting to have been executed by J. T. Callahan, Samuel Hanlin and John M. Henry; that said note has been destroyed, or is in the possession of some one to the grand jury unknown; that the grand jury are unable to set out the same according to its tenor; with intent to defraud William H. Reed and

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Charles A. Mackenbach, of the firm of Reed & Mackenbach, contrary to the form of the statute, in such cases made and provided, and against the peace and dignity of the State of Indiana." Signed by the prosecuting attorney. The indictment was also duly endorsed "a true bill," and signed by the foreman of the grand jury.

We are not favored with a brief on behalf of the appellee. It is stated in the brief of counsel for the appellant that the second count of the indictment was quashed for the reasons as expressed by the court, that "it was not sufficient to set out in an indictment the substance only of the instrument alleged to have been forged, no matter what reason might be given by the grand jury therefor, and even if an indictment would be sufficient if a proper reason was stated for not setting out the instrument *in hæc verba* that this count is not sufficient, as it states two reasons which are laid in the disjunctive."

We think this count of the indictment sufficient. It is well settled that if the instrument alleged to be forged is lost, destroyed, in the hands of the defendant, or its whereabouts are unknown to the grand jury returning the indictment, such instrument need not be set out *in hæc verba* in the indictment, but it will be sufficient to set out the substance and describe the instrument, and state the reason why the grand jury are unable to set it out *in hæc verba*. *Birdg v. State*, 31 Ind. 88; *Armitage v. State*, 13 Ind. 441; *Munson v. State*, 79 Ind. 541; *Myers v. State*, 101 Ind. 379; *Hess v. State*, 73 Ind. 537; *State v. Potts*, 17 Am. Dec. 449; *Commonwealth v. Snell*, 3 Mass. 82; *People v. Kingsley*, 14 Am. Dec. 520; 2 Bishop Crim. Proc. (3d ed.), section 404; Whart. Crim. Pl. and Prac. (9th ed.), section 176; 1 Whart. Crim. Law (9th ed.), section 730.

The indictment in this case clearly sets forth in plain and concise language the offence with which the defendant is charged. It is set forth with such certainty that the court may pronounce judgment upon a conviction according to the

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right of the case, and this is all that is required under our system of criminal pleading. Section 1755, R. S. 1881.

Nor is the indictment bad by reason of the fact that it states two reasons why the forged instrument is not set out *in hæc verba*, which are connected by a disjunctive conjunction.

Section 1756, R. S. 1881, provides that "No indictment or information shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected, for any of the following defects:

"*Sixth.* For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged.

"*Tenth.* For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

These averments in the indictment do not relate to the statement of the charge or definition of the offence, but only a statement of an excuse or reason for not setting out a copy of the instrument. Contradictory and repugnant allegations even in an indictment or information do not constitute a ground to quash the same unless it contains matter which if true would constitute a bar to the prosecution. *Trout v. State*, 111 Ind. 499; *Conklin v. State, ex rel.*, 8 Ind. 458; *State, ex rel., v. Bridegroom*, 10 Ind. 170; *Collins v. State, ex rel.*, 11 Ind. 312.

The court erred in sustaining the appellee's motion to quash the second count of the indictment.

Judgment reversed, with instructions to overrule the motion to quash the second count of the indictment.

Filed June 18, 1890.

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No. 14,431.

## CONGER ET AL. v. LOWE ET AL.

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131	209
131	385
124	368
136	386
134	386
147	101

**WILL.—Construction of.—Conditional Life-Estate.—Remainder Over in Fee to Lawful Heirs.**—A testator devised land to his son during his natural life, declaring that upon the death of his son or upon his refusal to occupy or live on the farm, "I will, devise and bequeath the same to the said Samuel M. Conger's heirs." Samuel M. Conger took possession of the farm, but afterwards conveyed it by warranty deed, and ceased to live upon it. This suit is by the children of Samuel M. Conger, who is still in life, their claim being that under the will of their grandfather the title vested in them, and that they became entitled to the possession when their father abandoned and conveyed away the land.

**Held**, that the word "heirs" is to be construed to mean "children," and that upon the death of the testator the devisee took a life-estate in the land defeasible upon condition that he refused to live upon or occupy the estate, and that the will created a vested remainder over in fee to the testator's children, to take effect in possession upon the termination of the estate of the father.

**Held**, also, that immediately upon the conveyance by their father the children were entitled to possession.

**SAME.—Life-Estate.—Remainder.—Restraint upon Alienation.**—Where an estate for life, or years, is created with a reversion to the grantor, or a valid remainder over to designated persons, conditions imposing restrictions and qualifications upon the power to alienate or use the estate are valid.

**SAME.—Power to Restrain Alienation.—Foundation of.**—The foundation of the power to restrain alienation rests upon the fact that there remains, or is vested, in some one a valid remainder or reversion, whose estate in possession is contingent upon some event, which defeats the precedent estate, and who is entitled to take advantage of the prohibited act or use.

**SAME.—Word "Heirs."—Meaning of Term.—Rule in Shelley's Case.**—When it becomes manifest that the word "heirs" was used as a synonym for "children," or in some modified sense, the rule in Shelley's case will not be applied to overturn the testator's intention.

From the Fulton Circuit Court.

G. W. Holman, R. C. Stephenson and J. H. Bibler, for appellants.

M. L. Essick, O. B. Montgomery, J. Rowley and M. A. Baker, for appellees.

MITCHELL, J.—The controversy here is over the construction of a clause in the last will and testament of Lewis B. Conger, late of Fulton county, deceased, which reads as follows:

“My beloved wife, Hannah, is to have and to hold the two above described pieces of land during her lifetime; at her decease, I will, devise and bequeath the same to my son, Samuel M. Conger, during his natural lifetime: *Provided*, He will live on and occupy the same; at his death, or his refusal to live on or occupy the same, then and in that case, as well as at the said Samuel M. Conger’s death, I will, devise and bequeath the same to the said Samuel M. Conger’s lawful heirs.”

The testator died in 1874, and at the time of his death his son, Samuel M. Conger, had four children living, born in lawful wedlock. Others have been born to him since. The testator’s widow died in 1880. Upon the death of his mother, Samuel M. took possession of the farm devised to him as above, and occupied it with his family until the 21st day of May, 1886, when he conveyed it by warranty deed to Louisa Lowe, wife of Peter D. Lowe, since which time he has ceased to live upon or occupy the land. This suit is by the children of Samuel M. Conger, who is still in life, their claim being that under the will of their grandfather the title vested in them, and that they became entitled to the possession when their father abandoned and conveyed away the farm. It is abundantly clear that the purpose of the testator was: 1. To create an estate for life in his widow, with a remainder over for life to his son, Samuel M.; and 2. To limit the fee over to the “lawful heirs” of his son, the limitation over to take effect in possession, either upon the refusal of his son to occupy the land, or upon his death. Shortly expressed, the devise was to Samuel M. Conger for life, upon condition that he occupy the estate, with a limitation over in fee to his “lawful heirs,” to take effect upon

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the death, or upon the refusal of the life-tenant to occupy. A preliminary inquiry arises concerning the validity and effect of the condition which makes, or attempts to make, the precedent life-estate of Samuel M. defeasible upon his failure or refusal to occupy the land. The purpose and practical effect of the condition was to impose a restraint upon the power of the life-tenant to alienate his estate in the land, either voluntarily or involuntarily. Surely, if the continuance of his estate depended upon his taking and remaining in possession during his lifetime, his power to sell was effectually restrained, for of what value was the right to sell if the estate sold was defeated the moment the vendor put the purchaser into possession?

It is a settled rule in the law that conditions in conveyances, or devises in fee, in general restraint of the power of alienation, are void, as being contrary to the policy of the law, and inconsistent with, and repugnant to, the estate granted. *Allen v. Craft*, 109 Ind. 476; *Mandlebaum v. McDonell*, 29 Mich. 78 (18 Am. Rep. 61); *McCleary v. Ellis*, 54 Iowa, 311 (37 Am. Rep. 205); 20 Am. Law Reg. 180, and note; *DePeyster v. Michael*, 6 N. Y. 467; 1 Shars. & B. Lead. Ca. Real Prop. 130; 6 Am. and Eng. Encyc. Law, 877.

Where, however, an estate for life, or years, is created, with a reversion to the grantor, or a valid remainder over to designated persons, conditions imposing restrictions and qualifications upon the power to alienate or use the estate, are valid and maintainable upon reason and authority. Even estates in fee simple may be subjected to valid limitations over, and be made defeasible or subject to forfeiture, upon condition that the grantee, or devisee uses, or fails to use, the estate in a particular way, or for a particular purpose, or conveys it to a certain person, or to any person whatever, or allows it to be sold on execution, or to become encumbered, or the like.

Where a precedent estate is made defeasible upon the happening of a certain event, which event also marks the tak-

ing effect in possession of a valid limitation over, the happening of that event puts an end to the precedent estate, and gives the right of possession to the person in whom the remainder or reversion is vested. The foundation of the power to restrain alienation rests upon the fact that there remains, or is vested, in some one a valid remainder or reversion, whose estate in possession is contingent upon some event, which defeats the precedent estate, and who is entitled to take advantage of the prohibited act or use. *Harmon v. Brown*, 58 Ind. 207; *O'Harrow v. Whitney*, 85 Ind. 140; *Mandlebaum v. McDonell*, *supra*; *De Peyster v. Michael*, *supra*.

If, then, it shall be found that the devise created an estate for life in Samuel M. Conger, defeasible upon the condition that he refused to occupy, with a valid reversion or remainder over in fee to persons who are entitled to take advantage of the condition, it must follow that the condition was valid and enforceable. In that event creditors, purchasers, all persons dealing with the land, were chargeable with notice of the will, and of the defeasible character of the estate of the devisee, and of the fact that it was limited over to others, to take effect upon the refusal of the life-tenant to occupy. We adopt the language of Mr. Justice MILLER, in *Nichols v. Eaton*, 91 U. S. 716, wherein the learned justice says: "Nor do we see any reason, in the recognized nature and tenure of property, and its transfer by will, why a testator who gives, who gives without any pecuniary return, who gets nothing of property value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived." *Cowell v. Springs Co.*, 100 U. S. 55; *Woodworth v. Payne*, 74 N. Y. 196.



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As a matter of course all that has preceded depends upon whether or not the will creates a life-estate, with a valid remainder over in fee. If, as is contended, Samuel M. Conger took an estate in fee, within the rule in Shelley's case, then the condition is void, because no one can create an estate that in law constitutes a fee, and then deprive the owner of those essential rights and privileges which the law annexes to it, without reserving a reversion to himself, or to some one in whom the right to insist upon the condition is vested.

It is proper now to examine the scheme that the testator had in his mind, and to which he desired to give effect in his will, so as to ascertain if possible whether the phrase "lawful heirs" was used in the popular or technical sense. If it was the intention that the lawful heirs of Samuel M. Conger should take the estate from their father by descent, after the termination of his life-estate, then the whole estate must have vested in him. When an estate is given to one for life, with the remainder to his heirs, the law by an arbitrary rule vests the whole estate in the ancestor. *Siceloff v. Redman*, 26 Ind. 251; *Kleppner v. Lavery*, 70 Pa. St. 70; 6 Am. & Eng. Encyc. of Law, 879.

The rule is an unbending one, that if an estate be given, as an immediate remainder to the heirs of one in whom an interposed estate is vested, the whole estate is united and vests as an executed estate of inheritance in the ancestor, upon the principle that the inheritance can not be greater than the estate vested in the ancestor. *Doebler's Appeal*, 64 Pa. St. 9.

The rule that the word "heirs," when found in a will, will be construed as a word of limitation, and not of purchase, unless there be explanatory words clearly showing that it was used in a popular or restricted sense, admits of no exception, and when the word is used as a word of limitation it is wholly immaterial that the testator's intention may be frustrated by the application of the rule. *Allen v. Craft*, *supra*, and cases cited. It is only when it clearly ap-

pears from the context that the word was not used as a word of limitation, but of purchase, that the rule will not be permitted to defeat the manifest intent of the testator. When the intention to use a word, supposed to be a word of limitation, as a word of purchase, unmistakably appears in the will, the rule has always yielded to the clear intention of the testator. *Belslay v. Engel*, 107 Ill. 182; *Millett v. Ford*, 109 Ind. 159.

The rule in Shelley's case is not regarded as a device to discover the testator's intention. It is only applied after his intention has been discovered, when, by its own inexorable force, it unites in the ancestor any estate which his heirs are to take as such, after a precedent estate given to him, no matter what the purpose of the testator may have been.

It should be remembered that there is a material and controlling distinction between a devise of an estate to a person named and his lawful heirs, and a devise to the lawful heirs of a person named, and the fact should be kept in view that the devise under consideration falls within the latter class. Thus, in *Simms v. Garrott*, 1 Dev. & Bat. Eq. 393, where a bequest of personal property was made to a person during her natural life, and at her death to her lawful heirs, it was held that a legacy to the lawful heirs of a person living is equivalent, as a description, to a legacy to his next of kin, or to his children. *Shimer v. Mann*, 99 Ind. 190; *Darbi-son v. Beaumont*, 1 P. Wms. 229.

Where the devise is made directly to the heirs of a person living, since no one can be heir to the living in the technical sense, there would be no one capable of taking the estate devised, except by construing the word "heirs" to mean "kinsman" or "children." Where the devise is to a person and his lawful heirs, no such obstacle is encountered.

The language employed in the will under consideration makes it certain that the persons referred to therein as Samuel M. Conger's lawful heirs, were to take under the will directly from the testator, and not by descent from

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Samuel M. Conger, as heirs. The testator declared in terms that can not be mistaken, that upon the death of his son, or upon his refusal to occupy or live on the farm, "I will, devise and bequeath the same to the said Samuel M. Conger's lawful heirs."

It is clearly apparent that the testator contemplated that the persons designated as "lawful heirs" should be persons living before the death of Samuel M. Conger, because not only the title, but the possession of the estate in remainder over was to vest in them by the terms of the will, as well upon the failure or refusal of his son to occupy the farm as upon his death.

Uncontrolled by the context, the phrase "lawful heirs" would designate those persons who under the statute of descents would succeed to the property in case the testator's son should die intestate. But there was a contingency provided for in the will, upon which the remainder over was to take effect before the death of his son, and it is therefore absolutely certain that the testator did not use the phrase for the purpose of designating the whole class of lineal or collateral relatives, who at the death of his son might fall within that denomination.

It is true that the word "heirs," unless other parts of the will imperatively require it, is to be taken as having been used in its technical sense; yet, when to use it in that sense renders the general purpose and intent of the will insensible under any rule of law, and defeats the manifest purpose of the testator, the circumstances are persuasive that the testator must have used the word to designate some other class of persons than those technically denominated "heirs." When it becomes manifest that it was used as a synonym for "children," or in some modified sense, the rule in Shelley's case will not be applied to overturn the testator's intentions. *Underwood v. Robbins*, 117 Ind. 308; *Millett v. Ford*, *supra*; *Ridgeway v. Lanphear*, 99 Ind. 251.

As is pertinently said in *Daniel v. Whartenby*, 17 Wall.

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639, "But if there are explanatory and qualifying expressions, from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail."

As we have already seen, it is clear that the phrase "lawful heirs" could not have been used by the testator to designate those who should succeed to his son's estate upon his death. To give it such a construction would render nugatory and meaningless the provision that the estate was devised to the lawful heirs of the life-tenant in case the latter refused to occupy it. The will is therefore to be read as if the word "children" had been used instead of "heirs."

The conclusion follows that upon the death of the testator Samuel M. Conger took a life-estate in the land in controversy, which was defeasible upon condition that he refused to live upon or occupy the estate, and that the will created a vested remainder over in fee in his children, to take effect in possession upon the termination of the estate of their father. Upon the death of the testator the remainder in fee vested in the children then living, subject, however, to open and let in after-born children, who should be born in lawful wedlock during the lifetime of their father. *Surdam v. Cornell*, 116 N. Y. 305; *Monarque v. Monarque*, 80 N. Y. 320.

The court erred in sustaining the demurrer to the complaint.

Judgment reversed, with costs.

Filed June 18, 1890.

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The Vincennes Water Supply Company v. White.

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No. 14,274.

## THE VINCENNES WATER SUPPLY COMPANY v. WHITE.

**BILL OF EXCEPTIONS.**—*Failure of Judge to Sign Within Time Allowed.*—A bill of exceptions signed by the judge and filed with the clerk is properly a part of the record, notwithstanding the failure of the judge to sign the bill which was presented at the proper time until the time allowed had expired.

**MASTER AND SERVANT.**—*Injury to Contractor's Employees.*—*Liability of Principal.*—One who lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let.

**SAME.**—*Visible Risk.*—*Assumption of.*—An employee injured by the caving in of a ditch which he is assisting to construct through a soil composed largely of sand and gravel, can not recover for such injury, since the liability of the trench to cave in, and the danger, are alike open to the observation of all parties.

From the Knox Circuit Court.

*F. W. Viehe* and *M. J. Niblack*, for appellant.

*J. S. Pritchett*, *W. A. Cullop* and *C. B. Kissinger*, for appellee.

**COFFEY, J.**—This was an action by the appellee against the appellant to recover damages on account of a personal injury.

The complaint alleges, substantially, that the appellant is a corporation, organized under the laws of the State of Indiana; that on the 12th day of July, 1886, the appellant was engaged in constructing, in and for the city of Vincennes, certain waterworks, and in connection therewith was constructing an engine-house and stand-pipe, and digging a ditch from within the inclosure of the engine-house to the stand-pipe, a distance of about one hundred feet; that at said time appellant was laying the foundation of said engine-house by digging excavations for the same to the depth of four feet, and the width of two feet, and filling the same with

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brick, stone, and mortar ; that the appellee was engaged as a laborer, in the employment of the appellant, in digging said ditch leading to said stand-pipe, and was digging therein at the place of intersection of said ditch and the foundation aforesaid ; and while so engaged, at the bottom of said ditch, the banks and overhanging earth on either side thereof, without any fault or negligence on the part of the appellee, caved in, fell upon him and broke his leg ; that the caving in and falling of said banks were caused by the negligence and carelessness of the appellant in this : that the soil in which said ditch was dug was largely composed of dry sand and gravel, after a depth of — feet below the surface, which fact was known to the appellant ; that the banks of said ditch, when dug to the depth of eight feet, and the length of — feet, were not self-supporting, because of the kind of soil, and would cave in, or were at any time liable to cave in unless supported by stays, which fact the appellant knew from constant observation, and from many years of experience in digging ditches in such soil, and of which appellee was ignorant, having had no experience in such work prior to said time ; that knowing the depth of said ditch, and the imminent peril of appellee while at work therein, because of the banks thereof being liable to cave in at any time, and knowing the necessity of having proper stays to prevent the same from caving, which could have been provided at but little expense, the appellant carelessly and negligently omitted to provide said stays, or to use any other means of precaution to prevent the banks from falling in, in consequence of which omission the appellee was injured as aforesaid, without any fault on his part.

Upon issues formed the cause was tried by a jury, resulting in a verdict and judgment for the appellee.

The assignment of error calls in question the correctness of the ruling of the circuit court in overruling the motion for a new trial.

The only reasons assigned for a new trial were that the

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verdict of the jury was not supported by the evidence, and was contrary to law.

Before considering the questions arising on the assignment of error, it becomes necessary to meet and decide an objection made by the appellee as to the sufficiency of the clerk's certificate to the transcript, and an objection that the bill of exceptions containing the evidence is not properly in the record.

There has been no motion interposed to dismiss this cause on account of the insufficiency of the clerk's certificate. Following the suggestion contained in appellee's brief, we have, however, examined the certificate, and find it a substantial compliance with the statute.

The motion for a new trial was filed and overruled on the 3d day of March, 1887, and sixty days' time were given by the court to file bills of exceptions.

The judge before whom the trial was had inserted the following in the bill of exceptions now before us:

"This bill was tendered to me for approval and signature this 2d day of May, 1887. O. M. WELBORN, Judge."

The bill, however, was not signed until the 9th day of June, 1887.

It is contended by the appellee that notwithstanding the fact that the bill was subsequently filed in the clerk's office, it is not properly a part of the record. This contention can not be maintained. The statute makes it the duty of the judge to insert in the bill of exceptions the date at which it is presented to him for his signature. When signed it is his duty to file it with the clerk. The date at which the bill is signed is immaterial. The judge can not deprive a party of the benefit of a bill of exceptions by failure to attach his signature until the time given has expired. When a party entitled to a bill of exceptions tenders the proper bill within the time allowed by the court he has done his whole duty, and the duty of signing and filing then remains with the judge.

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The judge who signed the bill certified that it contained all the evidence given on the trial of the cause, and there is nothing on the face of the bill, as contended by the appellee, from which the contrary appears. The bill of exceptions containing the evidence, in this cause, is in the record and is perfect on its face.

The evidence, as it comes to us, proves beyond question that the work of constructing the system of water works for the city of Vincennes was performed by Samuel R. Bullock & Co., under a contract with the appellant, and not by the appellant. Samuel R. Bullock & Co. employed E. F. Fuller as chief engineer, one Crawley as assistant engineer, John Hock as foreman of the work, Mr. Taylor as book-keeper and paymaster, and John Fuller as assistant book-keeper and paymaster, and through these men the work was performed and the expenses paid. Through these men, as the employees of Samuel R. Bullock & Co., the appellee was employed at the time he received the injury of which he complains.

It is true that the appellee and some other witnesses testify that they were employed by the appellant, but their own statements, together with the other testimony in the cause, show beyond doubt that such testimony was the statement of a mere conclusion, which can not prevail against the undisputed facts. The appellee was employed by Hock, who was the foreman, employed by Samuel R. Bullock & Co., the contractors with the appellant for the construction of the work, and was not, therefore, an employee of the appellant in such a sense as to constitute the relation of master and servant.

It seems to be settled law that where one person lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, he is not liable for any injury which may occur to others by reason of any negligence of the person to



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whom the contract is let. *Wabash, etc., R. W. Co. v. Farver*, 111 Ind. 195; *Ryan v. Curren*, 64 Ind. 345, and authorities there cited.

It further appears from the evidence in the cause that the appellee was injured by the caving in of a ditch which he was assisting to construct through a soil composed largely of sand and gravel. The liability of the trench to cave in by reason of the peculiarity of the soil, and the danger attending the work, were open alike to the observation of all the parties. It has been repeatedly held that under such circumstances there can be no recovery. *Atlas Engine Works v. Randall*, 100 Ind. 293; *Rietman v. Stolle*, 120 Ind. 314; *Lake Shore, etc., R. W. Co. v. McCormick*, 74 Ind. 440; *St. Louis, etc., R. W. Co. v. Valirius*, 56 Ind. 511; *Umbach v. Lake Shore, etc., R. W. Co.*, 83 Ind. 191; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1.

In our opinion the court erred in overruling the motion for a new trial.

Judgment reversed, with directions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed June 7, 1890; petition for a rehearing overruled Sept. 17, 1890.

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No. 14,096.

MAHONEY v. NEFF ET AL.

JUDGMENT.—*Of Justice of Peace.—Duration of Lien.*—The lien of a judgment rendered before a justice of the peace extends ten years from the date of the rendition of the judgment, and not ten years from the date of filing the transcript of the judgment in the clerk's office.

From the Montgomery Circuit Court.

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*Mahoney v. Neff et al.*

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*J. Wright and J. M. Seller, for appellant.**A. D. Thomas and W. J. Darnell, for appellees.*

OLDS, J.—This is a suit by the appellees against the appellant to recover a judgment against the appellant for the amount of a judgment which appellees held against one McCreary, which, it is alleged, the appellant agreed to pay.

On proper request, the court found the facts and stated its conclusions of law. The court found the facts to be that McCreary owned land in Montgomery county; that appellees recovered a judgment against said McCreary, before a justice of the peace of said county, on the 3d day of March, 1877; that appellees filed a transcript of said judgment in the clerk's office of said county on the 4th day of December, 1879, and on the 26th day of April, 1887, McCreary sold said land to the appellant, and the appellant, as a part of the consideration, agreed to pay all judgments against said McCreary that were liens on said land.

The court stated as a conclusion of law that appellees' judgment was a lien on said land at the time of the sale. The appellant excepts to the conclusion of law.

More than ten years having elapsed from the rendition of the judgment to the date of the sale, and the sale having occurred less than ten years from the date of filing a transcript in the clerk's office, the correctness of the conclusion of law stated by the court depends upon whether the judgment lien extends ten years from the date of the rendition of the judgment before the justice of the peace, or ten years from the date of filing the transcript of the judgment in the clerk's office. This question has been recently fully considered and decided by this court holding that the lien only extends ten years from the date of the rendition of the judgment, and we deem it unnecessary to further discuss the question. *Brown v. Wuskoff*, 118 Ind. 569.

The court erred in its conclusions of law.

Judgment reversed, at costs of appellees, with instructions

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The State v. Kimmerling.

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to the circuit court to restate its conclusion of law and render judgment in accordance with this opinion.

Filed April 26, 1890.

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No. 15,581.

THE STATE v. KIMMERLING.

CRIMINAL LAW.—*Kidnaping.—Statute.—Exceptions.*—An indictment for kidnapping based upon section 1915, R. S. 1881, which defines the offence as follows: "Whoever kidnaps or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons any person with the intention of having such person carried away from his place of residence unless it be in pursuance of the laws of this State or of the United States, is guilty of kidnapping," etc., must in addition to alleging the unlawful and felonious character of the acts with which the defendant is charged negative the exceptions in the statute, and allege that the acts were not done in pursuance of the laws of this State or of the United States.

SAME.—*Exception in Statute.—Averment in Negation of.—Insufficiency.*—An averment in the indictment that the defendant carried away from her residence the person named, "not then and there having established a claim upon her according to the laws of the State of Indiana or the United States," is not the equivalent of that required by the statute.

From the Madison Circuit Court.

D. W. Wood, Prosecuting Attorney, and W. R. Myers, for the State.

W. A. Kittinger and L. M. Schwinn, for appellee.

MITCHELL, J.—Section 1915, R. S. 1881, defines the offence of kidnapping as follows: "Whoever kidnaps, or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons any person, with the intention of having such person carried away from his place of residence, unless it be in pursuance of the laws of this State or of the United States, is guilty of kidnapping," etc.

The charge in the indictment in the present case is that

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the defendant did, on a day named, unlawfully, feloniously, forcibly and fraudulently, and by means of menaces, threats and false promises, feloniously and forcibly decoy, kidnap and carry away a certain person named from her residence in a township and county named, in this State, to and into the State of Illinois, the defendant "not then and there having first established a claim upon her," the person named, "according to the laws of the State of Indiana or the laws of the United States."

After a verdict of conviction the judgment was arrested upon the defendant's motion, and the sole question for consideration here is, whether or not the facts stated in the indictment constitute a public offence. The indictment is assailed because it is not charged therein that the acts alleged to have been done were not done in pursuance of the laws of this State or of the United States. In support of the indictment it is contended that it was not necessary to plead these negative facts, and if it was, that the facts pleaded constitute a sufficient negative. The exception, as will be seen by an examination, is found in the clause of the statute which defines the offence, and not in a proviso or other substantive clause.

The authorities all agree that when an exception constitutes a part of the description of the offence sought to be charged, or if it be in the same clause of the act which defines the offence, it is necessary to show by negative averments that the defendant is not within the exception, otherwise no offence is charged. *Russell v. State*, 50 Ind. 174; *Brutton v. State*, 4 Ind. 601; *State v. Maddox*, 74 Ind. 105; *Mergentheim v. State*, 107 Ind. 567; Gillett Crim. Law, section 132 a.

It was necessary, therefore, that the exceptions contained in the statute should have been negatived by suitable averments in the indictment. *State v. Sutton*, 116 Ind. 527; *Bassett v. State*, 41 Ind. 303; *Willey v. State*, 46 Ind. 363;

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to the circuit court to restate its conclusion of law and render judgment in accordance with this opinion.

Filed April 26, 1890.

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No. 15,581.

THE STATE v. KIMMERLING.

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**CRIMINAL LAW.—Kidnapping.—Statute.—Exceptions.**—An indictment for kidnapping based upon section 1915, R. S. 1881, which defines the offence as follows: "Whoever kidnaps or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons any person with the intention of having such person carried away from his place of residence unless it be in pursuance of the laws of this State or of the United States, is guilty of kidnapping," etc., must in addition to alleging the unlawful and felonious character of the acts with which the defendant is charged negative the exceptions in the statute, and allege that the acts were not done in pursuance of the laws of this State or of the United States.

**SAME.—Exception in Statute.—Averment in Negation of.—Insufficiency.**—An averment in the indictment that the defendant carried away from her residence the person named, "not then and there having established a claim upon her according to the laws of the State of Indiana or the United States," is not the equivalent of that required by the statute.

From the Madison Circuit Court.

*D. W. Wood*, Prosecuting Attorney, and *W. R. Myers*, for the State.

*W. A. Kittinger* and *L. M. Schwinn*, for appellee.

**MITCHELL, J.**—Section 1915, R. S. 1881, defines the offence of kidnapping as follows: "Whoever kidnaps, or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons any person, with the intention of having such person carried away from his place of residence, unless it be in pursuance of the laws of this State or of the United States, is guilty of kidnapping," etc.

The charge in the indictment in the present case is that

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the defendant did, on a day named, unlawfully, feloniously, forcibly and fraudulently, and by means of menaces, threats and false promises, feloniously and forcibly decoy, kidnap and carry away a certain person named from her residence in a township and county named, in this State, to and into the State of Illinois, the defendant "not then and there having first established a claim upon her," the person named, "according to the laws of the State of Indiana or the laws of the United States."

After a verdict of conviction the judgment was arrested upon the defendant's motion, and the sole question for consideration here is, whether or not the facts stated in the indictment constitute a public offence. The indictment is assailed because it is not charged therein that the acts alleged to have been done were not done in pursuance of the laws of this State or of the United States. In support of the indictment it is contended that it was not necessary to plead these negative facts, and if it was, that the facts pleaded constitute a sufficient negative. The exception, as will be seen by an examination, is found in the clause of the statute which defines the offence, and not in a proviso or other substantive clause.

The authorities all agree that when an exception constitutes a part of the description of the offence sought to be charged, or if it be in the same clause of the act which defines the offence, it is necessary to show by negative averments that the defendant is not within the exception, otherwise no offence is charged. *Russell v. State*, 50 Ind. 174; *Brutton v. State*, 4 Ind. 601; *State v. Maddox*, 74 Ind. 105; *Mergentheim v. State*, 107 Ind. 567; Gillett Crim. Law, section 132 a.

It was necessary, therefore, that the exceptions contained in the statute should have been negatived by suitable averments in the indictment. *State v. Sutton*, 116 Ind. 527; *Bassett v. State*, 41 Ind. 303; *Willey v. State*, 46 Ind. 363;

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*Willey v. State*, 52 Ind. 246; *Meier v. State*, 57 Ind. 386; *State v. Meek*, 70 Mo. 355 (35 Am. Rep. 427).

The averment that the defendant had not then and there established a claim upon the person kidnapped, or carried away from her residence, according to the laws of the State of Indiana or of the United States, is without force or meaning as applied to the statute under which the indictment was returned. The statute which formerly made it a crime to steal and carry away, or to forcibly arrest and take any person to parts without the State, without first having established a claim upon the services of such person, is now happily obsolete, and repealed by the statute above set out.

The averment in the indictment was not the equivalent of that required by the statute. The crime of kidnapping may be committed in either one of two ways: 1. By forcibly or fraudulently carrying one off or decoying him from his place of residence, unless it be done in pursuance of law, State or Federal. 2. By arresting or imprisoning a person with the intention of having him carried away, unless it be done in pursuance of like authority.

It is essential to the sufficiency of an indictment, whether it be under one branch of the statute or the other, that it contain negative averments showing that the acts were not done in pursuance of the laws of this State or of the United States. The charge that the acts were done unlawfully and feloniously is not sufficient in a case like this, in which the negative matter is an essential ingredient and description of the offence.

The judgment is affirmed.

Filed June 19, 1890.

Chaplin *et al.* v. Baker.

No. 14,136.

## CHAPLIN ET AL. v. BAKER.

**PRINCIPAL AND SURETY.—Cross-Complaint.—Sufficiency of.—Statute.**—In an action upon a note and to foreclose a mortgage executed to secure it, a cross-complaint which alleges that the defendant executed the note and mortgage as the surety of the co-defendant and demands that the interest of the co-defendant be first sold before the sale of any of the property of the cross-complainant, is good under section 1212. R. S. 1881, relating to the rights of sureties.

**SAME.—Assumption of Liability by Surety.**—An answer to such cross-complaint which alleges that the cross-complainant agreed with the plaintiff and his co-defendant to pay and satisfy the note and mortgage, is good.

**SAME.—Parol Negotiations.—Merger.**—Where a contract has finally been reduced to writing, all previous parol negotiations are merged in the written contract. Where therefore land has been conveyed by warranty deed, a prior parol agreement to satisfy an encumbrance upon the land is ineffectual for any purpose as an agreement.

**SAME.—Pleading.—Departure.**—In an action upon a promissory note where one of the defendants, a married woman, alleges her suretyship, a reply which attempts to show a liability upon a subsequent undertaking is a departure, and is bad.

**SAME.—Change of Relative Position.**—Where a surety for a valuable consideration agrees with the principal to pay the joint indebtedness, he thereby becomes the principal and the principal becomes his surety.

**ESTOPPEL.—Who May Take Advantage of.**—One who insists upon the acts of another as working an estoppel, must show that he acted upon the same and was influenced thereby to do some act which would result in an injury if the other is permitted to gainsay or deny the truth of what he did.

From the Madison Circuit Court.

*H. D. Thompson*, for appellants.

*W. A. Kittinger*, *L. M. Schwinn* and *E. B. Mahon*, for appellee.

**BERKSHIRE, C. J.**—This was an action upon a note, and to foreclose a mortgage.

The complaint alleges that the appellants, John Chaplin, Frank Gillett, and Caroline Gillett, on the 23d day of July,

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1884, executed their joint and several promissory note to the appellee for the sum of \$376, and to secure the same the said appellants on the same day executed a mortgage on the real estate therein described ; that there remains due and unpaid on the note the sum of \$210, and attorney's fees ; that after the execution of said mortgage, one Emma Sullivan, who is made a party defendant, became the owner of said real estate.

Judgment is demanded for the amount due on the note against the said makers thereof, and against all of the appellants for a foreclosure of the mortgage.

The appellants Chaplin and Frank Gillett filed a joint answer, in two paragraphs, the general denial and a plea of payment.

The appellant Caroline Gillett filed a separate answer, in two paragraphs, the general denial, and a paragraph, in substance, that when she executed the note and mortgage she was a married woman, and that she executed said instruments as surety for the appellants Chaplin and Frank Gillett, and that the undivided interest in said land which she and her husband mortgaged to secure said note was her separate property. To this paragraph of answer the appellee filed a demurrer, which was overruled, and he saved an exception.

To the second paragraph of the answer of Chaplin and Frank Gillett, the appellee filed a reply in general denial, and to the second paragraph of the answer of the appellant Caroline Gillett, the appellee filed a reply in three paragraphs, the first of which was a general denial.

The second paragraph was, in substance, as follows : That for a valuable consideration paid to her by her co-appellant Chaplin, after the execution of said note and mortgage, she promised and agreed with the appellee, and with her said co-appellant, to pay and satisfy said note and mortgage.

The third paragraph is, in substance, that after the execution of said note and mortgage, the said Caroline Gillett sold

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*Chaplin et al. v. Baker.*

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and conveyed her interest in the mortgaged premises for the sum of \$600 to Emma Sullivan, and executed to her a warranty deed therefor; that to induce said Emma Sullivan to purchase said interest in the said real estate the said appellant promised and agreed to pay off and satisfy said note and mortgage, and that said Emma Sullivan was induced by said promise and agreement to purchase said real estate.

To the said second and third paragraphs of reply the said appellant filed demurrers, which were overruled by the court, and she excepted.

The appellants Gillett filed separate cross-complaints, to which the appellee demurred, and the court having overruled the demurrers, the appellee reserved proper exceptions.

We do not care to notice the questions arising on the demurrers to the cross-complaint (and to the answers that were filed thereto) of the said co-appellant, Caroline Gillett, as the same questions are presented by the demurrers to her answer to the complaint and to the replies to said answers. The cross-complaint of the appellant Frank Gillett avers that he and his co-appellant Caroline Gillett were, when said mortgage was executed, husband and wife, and then alleges the execution of the said note and mortgage by her as surety, and that the real estate mortgaged by them was her individual property, and that their co-appellant, Chaplin, owned the undivided one-half of it, and that he sold and conveyed his undivided half thereof to Emma Sullivan, and as a part of the consideration she assumed and agreed to pay and satisfy said note and mortgage, and save the appellants harmless because thereof; that the said appellant executed the note and mortgage as the surety of the said Chaplin, and demanded that the said interest conveyed by the said Chaplin to the said Emma Sullivan be first sold before selling any property of the said appellant Frank Gillett.

To this cross-complaint the said appellant Chaplin and the said Emma Sullivan, were made defendants.

We are of the opinion that this cross-complaint was good,

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and the demurrer thereto properly overruled, not because of the averments of suretyship and coverture on the part of the wife of the said cross-complainant, but because of the relation of principal and surety between Chaplin and himself which is averred. Section 1212, R. S. 1881.

The appellee filed an answer, in three paragraphs, to this cross-complaint, the first being the general denial; the second, that the said Frank Gillett agreed with the appellee and the said appellant Chaplin, for a valuable consideration, to pay and satisfy said note and mortgage.

The third paragraph was, in effect, the same as the third paragraph of the reply to the separate answers of the appellant Caroline Gillett to the complaint.

To the said second and third paragraphs of answer the said cross-complainant filed demurrers.

We are of opinion that the second paragraph of the answer was good, and that the demurrer thereto was properly overruled.

Chaplin and the said cross-complainant were both liable upon the note, and by a parol agreement for a valuable consideration the relative positions of the parties, as between themselves, might be changed; if one of them was principal and the other surety, and for a valuable consideration the surety agreed with the principal to pay the joint indebtedness, he thereby became the principal, and the principal became his surety. *Sefton v. Hargett*, 113 Ind. 592.

As both were already bound to pay the note to the holder thereof, in no possible view of the case can it be said that the agreement was within the statute of frauds.

We need not consider separately the questions which arise upon the demurrer to the third paragraph of the answer to the said cross-complaint, as they are the same as those which arise upon the demurrer to the third paragraph of the reply to the answer of the appellant Caroline Gillett to the complaint.

The second paragraph of the answer of the appellant Car-

oline Gillett to the complaint was clearly good, and as her cross-complaint alleged the same facts, it was also good; indeed, the sufficiency of these pleadings is not seriously questioned.

In our judgment the second and third paragraphs of the reply to the second paragraph of the answer of said appellant to the complaint are each bad.

Error is not assigned as to the ruling of the court in overruling the demurrer to the second paragraph of reply, but in considering the evidence as applicable to the pleading upon the alleged error of the court in overruling the motion for a new trial, the same question is presented, therefore we consider the sufficiency of the pleading.

It is not necessary for us to determine whether or not the agreement alleged in the said second paragraph of reply is within the statute of frauds; conceding, for all the purposes of this case, that it is not within the statute, the paragraph is bad.

The action is not on the original undertaking (and such the agreement must be if not within the statute), but upon the note and mortgage. In no event did the said appellant become liable on the note, and therefore the reply is a departure.

The action is on the note and the facts alleged in the answer disclose a void obligation as to the appellant, and in reply the appellee says to the appellant, but notwithstanding you are not liable upon the note you are liable upon an after-undertaking.

The third paragraph of the reply is bad for several reasons.

The parol agreement therein pleaded was anterior to the execution of the conveyance to Emma Sullivan, and is, therefore, ineffectual for any purpose as an agreement.

It is as well settled by the decisions of this court as a question can be settled, that when parties have finally reduced their contract to writing, all previous negotiations rest-

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ing in parol are merged into the written contract, and that it alone must be looked to to ascertain the legal rights of the parties.

The appellant conveyed the land to Mrs. Sullivan by warranty deed, and if her title failed, or if to protect her title she was compelled to satisfy an existing encumbrance on the land, she must look to the covenants of warranty for reimbursement, and not to the previous parol agreement. But the contention is that the parol agreement worked an estoppel.

The only interest, so far as shown, which Mrs. Sullivan had in having the encumbrance removed was that her land might be relieved therefrom, and if the parol contract could have been enforced she was not in a condition to enforce it until compelled to pay off the indebtedness, or in some other way damaged because of the appellant's failure to remove the encumbrance, and her rights were exactly the same by virtue of the covenants in her deed. But suppose it be conceded that, if this were an action between Mrs. Sullivan and the appellant, the appellant would be estopped from pleading coverture and suretyship because of the inducement held out by the agreement to Mrs. Sullivan to purchase the real estate, we are at a loss to know upon what principle the appellee can claim the benefit thereof. He in no way changed his position in consequence of the promise and inducement made and held out to Mrs. Sullivan. In *Simpson v. Pearson*, 31 Ind. 1, this court said: "But one who insists upon the acts of another as working an estoppel must show that he acted upon the same, and was influenced thereby to do some act which would result in an injury if that other is permitted to gainsay or deny the truth of what he did. For it is a well settled rule in such cases, that no man can set up another's act or declaration as the ground of an estoppel, unless he has himself been misled or deceived by such act or declaration." See *Cook v. Walling*, 117 Ind. 9; *Blodgett v. Perry*, 97 Mo. 263.

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We are of the opinion that the court erred in overruling the demurrers to the said second and third paragraphs of reply and to the third paragraph of the answer of the appellee to the cross-complaint of the appellant Frank Gillett, and to the second and third paragraph of answer to the cross-complaint of the appellant Caroline Gillett.

There are some other questions presented which we do not pass upon, as they will not likely arise again.

Judgment reversed, with costs.

Filed April 2, 1890; petition for a rehearing overruled June 19, 1890.

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No. 14,373.

## WEIR v. SANDERS.

WIDOW.—*Expenses of Husband's Last Sickness.—Liability.—Statute Construed.*

—Under section 2422, R. S. 1881, making the widow liable for the expenses of the last sickness of her husband, when the estate is set off to her on petition, a suit is not maintainable against the widow on a judgment rendered against the husband upon a note executed by him before his death for medical services. The widow is liable only for an unliquidated indebtedness created on account of the last sickness of the husband, and is not liable to suit on notes executed by her husband or the judgments rendered against him.

From the Sullivan Circuit Court.

W. C. Hultz and O. B. Harris, for appellant.

J. T. Beasley and A. B. Williams, for appellee.

OLDS, J.—This is an action by the appellant against the appellee, who is the widow of James Sanders, deceased.

The complaint is in one paragraph, and, in substance, alleges the following facts:

That the appellee was intermarried with one James Sanders, on the 1st day of July, 1880, and that they lived to-

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gether as husband and wife from that date until the 1st day of October, 1885, when said James Sanders died; that on the 1st day of August, 1885, the said James Sanders executed his promissory note to the appellant, by which he agreed to pay to the appellant the sum of \$125 in one day from the date thereof, together with interest at 8 per cent. and attorney's fees; that the consideration for which said promissory note was given was services rendered by the appellant as a physician during the last sickness of the said James Sanders; that on the 1st day of September, 1885, the appellant, by his indorsement on the back of said note, duly assigned and transferred said note to one William H. Crowder; that on the 3d day of September, 1885, the said Crowder commenced suit before one Thomas J. Humphreys, a justice of the peace of Hamilton township, in said Sullivan county, and such proceedings were duly had in the premises that judgment was duly given on said note against the said James Sanders, on the — day of September, 1885, for \$138.60, and costs amounting to \$10, and the further sum of \$15 attorney's fees, and for the same amount against the appellant as indorser on said note; that on the 7th day of February, 1888, said judgment was duly assigned and transferred to the appellant; that the appellee, on the 14th day of March, 1887, filed her verified petition in the clerk's office of Sullivan county, Indiana, alleging the death of her husband, James Sanders, and that he left an estate of less value than \$500, and asking to have the same set off to her as his widow without administration, and that such proceedings were had that the same was duly set off to her by the judgment of the Sullivan Circuit Court, on the 4th day of June, 1887, vesting the title to all the property, both real and personal, of which said James Sanders died the owner, in the said appellee. Prayer for judgment against the appellee for \$200, and all proper relief.

To this complaint the appellee filed a demurrer for want of facts, which was sustained, and appellant excepted, and

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refused to amend or plead further, and judgment was thereupon rendered on demurrer for the appellee.

The ruling of the court in sustaining the demurrer to the complaint is assigned as error.

It is conceded that this is an action for a personal judgment against the appellee upon the judgment rendered against her husband, and it is contended that the appellee is liable under the provisions of section 2422, R. S. 1881, which is as follows: "Upon the court entering the decree vesting the title to such estate in the widow, the clerk of the court shall make and deliver to her a certified copy thereof; which shall be all the authority necessary to enable her to sue for and recover all debts due the decedent, and the possession of any property belonging to such estate, such suit being prosecuted in her own name. And such widow shall not be liable for any of the decedent's debts, except mortgages of real estate, but she shall pay and may be sued for reasonable funeral expenses of the deceased and expenses of his last sickness."

This section of the statute expressly exempts the widow from any liability for any of the debts of her husband. The judgment on which this suit is brought was rendered against the husband some time before his death, on a note executed by him some sixty days before he died. The judgment grows out of a contract of indebtedness on the part of the husband, and it is sought to hold the appellee, the widow, liable on the contract of her husband for the amount he agreed to pay for the medical services, and the rate of interest he agreed to pay, together with attorney's fees for the collection of the note.

It is manifest that this statute was intended to make the widow liable only for an unliquidated indebtedness created on account of the last sickness of the decedent, and it was not intended, as insisted upon in this case, to make the widow liable to suit and judgment upon a note or contract executed by her husband, or upon a judgment rendered against him



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upon a note or contract. A recovery against a widow under this section of the statute must be upon the account, and the complaint must aver the services rendered and the value thereof. If a recovery could be had on the complaint in this case it must be for the full amount of the judgment, for if the appellant is entitled to recover upon the judgment at all he is entitled to recover the full amount of the judgment, the effect of which would be to hold the widow liable on the contract of her husband, and make her liable not only for the expense of the last sickness of the decedent, but for interest on a note given by him, and attorney's fees in taking a judgment against the decedent in his lifetime, and for the costs in such case. Certainly no such construction can be placed upon the statute. The widow is liable for the reasonable expense of the last sickness of her deceased husband, when the estate is set off to her on petition without administration, but she is not liable to suit on notes executed by her husband or the judgments rendered against him.

There was no error in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed June 19, 1890.

124	394
137	313

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No. 14,347.

**SMITH v. THE LOUISVILLE, EVANSVILLE AND ST. LOUIS  
RAILROAD COMPANY.**

**COMMON CARRIER.**—*Freight Train.*—*Person Aboard of by Invitation of Conductor.*—*Injury by Being Thrown from Train.*—*Complaint.*—*Sufficiency of.*—A complaint alleged that the plaintiff while riding upon a freight train by the invitation and permission of the conductor, was, without being in fault, assaulted by one of the defendant's servants and thrown from the train and under the wheels; that the other servants of the defendant, with knowledge of his assailant's intention, did not interfere to protect him from injury.

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*Held*, that the complaint does not state facts sufficient to constitute a cause of action, no facts being alleged to show that the relationship of carrier and passenger existed, and to remove the presumption that the defendant's freight trains were confined exclusively to the transportation of freight.

*Held*, also, that what his assailant's duties were, and what he was engaged in at the time of the assault, should have been averred.

*SAME.—Person on Freight Train by Conductor's Invitation.*—A person who goes aboard a freight train by the invitation and permission of the conductor can not be regarded as a passenger, where it does not appear that the company either by usage or by its rules and regulations permits passengers on its freight trains.

From the Floyd Circuit Court.

*C. L. Jewett* and *H. E. Jewett*, for appellant.

*A. Dowling*, for appellee.

BERKSHIRE, C. J.—The appellant commenced this action by filing the following complaint, omitting the caption :

"The plaintiff complains of the defendant and says that at the time of the grievances hereinafter set out, the defendant was a corporation, owning and operating a line of steam railroad from New Albany, Indiana, to Mt. Vernon, Illinois, and as such was a common carrier of freight and passengers; that on the 8th day of May, 1887, the plaintiff, not being in the employment or service of the defendant, was, by the invitation and permission of the conductor of such train, riding upon a certain freight train of the defendant for the purpose of being carried from New Albany to a station on defendant's railroad called Milltown; that while so upon said train, and using due care and without his fault, the plaintiff was violently assaulted by one I. A. Turner, a servant of the defendant on said train, and was, with the wicked and malicious purpose of injuring plaintiff, thrown from said train and under the moving wheels, whereby he was mangled and bruised and caused great bodily and mental pain, and was forced to submit to the amputation of one of his legs, to his damage in the sum of six thousand dollars. The plaintiff avers that the other servants of the

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defendant upon said train had full knowledge of the wicked and unlawful intention of said Turner to assault and injure the plaintiff, but wholly failed and refused to interfere or protect this plaintiff, and by their negligence in so failing and refusing to deter the said Turner from his evil design, caused the injury to plaintiff aforesaid. The plaintiff avers that said injury was not caused by any negligence of the plaintiff, but solely by the negligence and wilful misconduct of the defendant and its servants as aforesaid."

The appellee addressed a demurrer to the complaint, which was sustained by the court, and the appellant reserved the proper exception.

The appellant having refused to amend his complaint, judgment was rendered against him for costs.

The only error which is assigned calls in question the ruling of the court in sustaining the demurrer to the complaint. We do not think that the court erred in its ruling.

It appears that the appellant was on board of one of the appellee's *freight trains* when the alleged assault occurred. But it is not alleged that he was a passenger on the train; the allegation is, that he was thus there on the invitation and with the permission of the conductor of the train. It does not appear that the rules and regulations of the appellee, or its practice independent thereof, extended to the public the privilege of travelling upon its freight trains; nor is it alleged that the appellant did not know when he went upon the train that it did not carry passengers. The rule is that freight trains are confined to the transportation of freight exclusively; to this rule there are exceptions. The character of the train was notice sufficient to put the appellant upon inquiry as to whether or not it was his right to board it as a passenger.

The trial court could not presume against the rule and in favor of the exception that the appellant was a passenger on the train.

If the appellant was in fact a passenger on the train, the

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facts creating the relation of carrier and passenger should have been pleaded. Did the appellee, by established usage, or by its rules and regulations, allow passengers upon its freight trains, then the proper allegations should have been made.

Going aboard of the train by the invitation and permission of the conductor did not of itself constitute the appellant a passenger. *Eaton v. Delaware, etc., R. W. Co.*, 57 N. Y. 382 (15 Am. Rep. 513); *Houston, etc., R. W. Co. v. Moore*, 49 Texas, 31 (30 Am. Rep. 98).

In the last cited case it is said: "It may be true, where a railroad company habitually permits passengers to travel on its freight trains, notwithstanding it may by regulation prohibit it, that the company will incur the same responsibility to such passengers as if they were on the regular passenger cars. But when it is shown that the regulations of the company absolutely forbid passengers riding on freight trains, and where there are no cars attached to such trains except those ordinarily accompanying trains exclusively for freight, or such as, by their appearance and manner in which they are filled up, could not be properly regarded as inviting passengers into the train, the burden of proving that the party injured was justified in going upon such train as a passenger properly devolves upon those who sue for damages resulting from injuries sustained by him while on such train."

In the first cited case the facts, briefly stated, were: The plaintiff, being under twenty-one years of age, was, with two other boys, walking toward his home on the railroad track, and having been passed by a coal train moving slowly, was beckoned by the conductor in charge of it, who was then on the rear car or caboose, to get upon the train. The plaintiff and his associates acted accordingly. The conductor afterwards solicited them to go with him on his return trip to a place called Phillipsburgh, where he would procure situations for them as brakemen. They went with him. The train towards morning stopped on the track at a point where

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there was a sharp curve in the road. In consequence of the conductor's negligence a collision occurred with another train, and the plaintiff was seriously injured.

The court holds that railroad companies, like other common carriers, have a right to make reasonable rules and regulations for the management of their business, and while they may, if they see fit, have the freight and passenger business carried on upon a single train under one management, they may also completely separate their transactions, by arranging them in distinct departments.

When this is so the duties of the engineer, conductor and brakeman of a freight train are such only as are incidental to the business of moving freight, and no power whatever is given them as to the transportation of passengers.

The court then says: "The remaining inquiry is, whether notice to a supposed passenger will not be implied from the nature and apparent division of the business. It would seem so. \* \* \* The presumption is that a person on a freight train is not, legally, a passenger; and it lies with him who claims to be one, to take the burden of proof to show that, under the special circumstances of the case, the presumption has been rebutted. So, if a stage coach proprietor should regularly carry his passengers in a stage and their baggage in a wagon, there would be a fair presumption that the wagon was not intended for passengers, though, under special circumstances, it might be used in that manner. A person asserting that he was a passenger, though riding in the baggage wagon, would be bound to prove it. In both these cases the distinction between the passenger and the freight business would be so marked by the external signs of classification, that any person of ordinary prudence would take notice of it. This would be equivalent to actual notice, and the burden of proof would devolve upon him to show that the carrier had relaxed his rule. *Robertson v. New York, etc., R. R. Co.*, 22 Barb. 91." 2 Redf. Am. R. W. Cases, 490; 10 Am. Law Reg. (N. S.) 615; *Elkins v. Boston, etc.*,

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*R. R. Co.*, 23 N. H. (3 Foster) 275; *Murch v. Concord, etc.*, *R. R. Co.*, 29 N. H. (9 Foster) 9.

In *Hobbs v. Texas, etc.*, *R. W. Co.*, 49 Ark. 357, it was held that where there is a published rule of a railway company that passengers are forbidden to ride on through freight trains, the fact that the rule has often been violated does not deprive the company of the right to begin its enforcement whenever it may deem it proper to do so, and one who boards a freight train which has no appearance of being held out for the accommodation of passengers, may be ejected from it by the conductor. *Morris v. Brown*, 111 N. Y. 318 (7 Am. St. Rep. 751, and note).

In *Lucas v. Milwaukee, etc.*, *R. W. Co.*, 33 Wis. 41 (14 Am. Rep. 735), a different rule was recognized, where the fact was that the railroad company habitually carried passengers upon many of its regular and ordinary freight trains, and a person went on board of one of the company's freight trains, believing at the time that the train carried passengers, and received no information to the contrary, but was directed by the conductor to go aboard of the train, and after he had done so found nothing in the condition or situation of the train to indicate that passengers were not carried upon that particular train as well as on other trains of like character.

In *Creed v. Pennsylvania R. R. Co.*, 86 Pa. St. 139 (27 Am. Rep. 693), the rule which we have recognized was held not to apply, because of the fact that the train was a mixed train upon which passengers as well as freight were transported. These cases are so different in their facts from the case under consideration that necessarily they are ruled by different principles.

The averments in the complaint are not such as to remove the presumption that the appellee's freight trains were confined exclusively to the transportation of freight, and to raise the presumption that the appellant was on the train as a passenger, and hence the case does not fall within the rule

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declared in *Craker v. Chicago, etc., R. W. Co.*, 36 Wis. 657 (17 Am. Rep. 504); *Goddard v. Grand Trunk R. W. Co.*, 57 Maine, 202 (2 Am. Rep. 39); *Passenger R. R. Co. v. Young*, 21 Ohio St. 518 (8 Am. Rep. 78, and cases cited).

The appellant not being on the train as a passenger, it is not material to inquire whether he was there as a trespasser or by the permission of the conductor, for in either case the appellee was not liable for the alleged assault, unless committed by an employee in the scope of his employment.

In *Noblesville, etc., G. R. Co. v. Gause*, 76 Ind. 142, it is said: "Counsel have cited cases declaring the familiar rule, that a master is responsible for the acts of the servant only when the latter is acting within the scope of his employment, but this was an unnecessary work, for the general rule is too well settled and understood to need support from adjudged cases. *Carter v. Louisville, etc., R. W. Co.*, 98 Ind. 552; *Evansville, etc., R. R. Co. v. McKee*, 99 Ind. 519. See note to *Fick v. Chicago, etc., R. W. Co.*, 60 Am. Rep. 878.

Judge COOLEY, in his work on Torts, says: "The test of the master's responsibility is not the motive of the servant, but whether that which he did was something which his employment contemplated, and something which, if he should do it lawfully, he might do in the employer's name." Cooley Torts, 629.

It is charged in the complaint that the appellant was assaulted by one Turner, a servant of the appellee on said train, but in what capacity he was serving the appellee is not stated.

Whether Turner was acting within the scope of his employment we are unable to determine from the averments in the complaint. To have rendered the complaint good it should have stated the character of service which Turner was required to perform as a servant of the appellee, and in what he was engaged at the time of the assault charged. If he was a brakeman, baggage-master, or the like, the fact should have been stated. The averment that the other servants had

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knowledge of the assault, and did not come to the rescue gives no support to the complaint.

If Turner was not acting within the scope of his employment, the knowledge possessed by the other employees could not render the appellee liable. But if it could, from the facts alleged it is not disclosed that they were in a condition to have prevented the assault and its consequences.

We find no error in the record.

The judgment is affirmed, with costs.

Filed June 19, 1890.

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No. 13,943.

## COPPAGE, RECEIVER, v. HUTTON.

**CORPORATION.**—*Subscription to Stock.*—*Articles of Association.*—*Acknowledgment.*—*Statutory Requirement.*—*Failure to Comply with.*—*Non-Liability of Subscriber.*—The statute (section 3851, R. S. 1881) requires that the persons who desire to organize a corporation shall "make, sign, and acknowledge, before some officer capable to take acknowledgment of deeds, a certificate, in writing," etc. The mere signing of the articles of association is not sufficient to complete the obligation, but in order to make valid and effective articles of association against all who sign, all must acknowledge them as the statute requires. One who simply signs the articles of association without acknowledging them, as the law requires, does not become a stockholder, and is not bound by his subscription.

From the Montgomery Circuit Court.

*P. S. Kennedy, S. C. Kennedy, B. T. Ristine, W. H. Ristine and J. E. Williamson*, for appellant.

*J. Wright and J. M. Seller*, for appellee.

**ELLIOTT, J.**—The appellant sues as the receiver of an insolvent corporation, and seeks to recover a subscription which he alleges the appellee made to the capital stock of the corporation. It is alleged that the appellee, with others, signed



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articles of association, and that he agreed to take two shares of the capital stock, and pay therefor one hundred dollars. The introductory clause of the articles of association reads thus: "We, the undersigned, agree to take the stock in the amount set opposite our names in a company to be organized for manufacturing and selling the Williamson Straw Stacker." There were eighty-three signers, and seven of them acknowledged the execution of the articles of association before a notary public, and the instrument was duly recorded. It is also alleged that eight thousand dollars of stock was subscribed, that the company was duly organized, and a board of directors elected.

There can be no doubt under the authorities that a valid subscription to the capital stock of a corporation may be made by signing the preliminary articles. Such a subscription becomes enforceable upon the perfection of the corporate organization according to law under articles of association. *Miller v. Wild Cat G. R. Co.*, 52 Ind. 51; *Nulton v. Clayton*, 54 Iowa, 425; *Phoenix, etc., Co. v. Badger*, 67 N. Y. 294; *Cravens v. Eagle, etc., Mills Co.*, 120 Ind. 6. If the promise of the appellee is not binding it must be for some other reason than that it was made before the organization of the corporation was fully effected.

The statute requires that the persons who desire to organize a corporation shall "make, sign, and acknowledge, before some officer capable to take acknowledgment of deeds, a certificate in writing," setting forth therein certain enumerated things. Section 3851, R. S. 1881. The contention of the appellee is that the promise is not effective, because the complaint shows that only seven of the eighty-three signers acknowledged the certificate. It seems quite clear, under the decision of this court in *Indianapolis, etc., Mining Co. v. Herkimer*, 46 Ind. 142, that the mere signing of the paper was not sufficient to complete the obligation, and that, in order to make valid and effective articles of association against all who sign, all must acknowledge them as the statute re-

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quires. Here it affirmatively appears that seven only of the signers acknowledged the execution of the instrument, and it can not be inferred that those who did not acknowledge it remained bound by its terms. As to them the instrument was incomplete, and it is quite well settled that an incomplete subscription can not be enforced. *Dutchers, etc., R. R. Co. v. Mabbett*, 58 N. Y. 397; *Reed v. Richmond, etc., R. R. Co.*, 50 Ind. 342; *Richmond St. R. R. Co. v. Reed*, 83 Ind. 9; *Williamson v. Kokomo, etc., Ass'n*, 89 Ind. 389.

It is, however, argued by appellant's counsel that the complaint does affirmatively show that the corporation was organized, but this does not meet the question, for it may well be that it was organized without the appellee as a stockholder. The fact that he did not acknowledge the instrument as the law requires implies that he did not become a stockholder, and there is nothing in the complaint which rebuts or opposes this implication. It devolved upon the plaintiff to remove the inference if he could. As the appellee did not acknowledge the instrument as the law requires, he did not become a stockholder, and if he were insisting that he was entitled to the number of shares set opposite his name, it is quite clear that the corporation might successfully resist his claim, since it is obvious that only those who acknowledge the articles of association as the law requires can successfully insist upon their right to stock. If the appellee can not be regarded as a stockholder, then it seems quite clear that he did not bind himself by simply signing the articles of association.

Whether a good complaint can be framed is not the question before us, for the only question presented by the record is as to the sufficiency of the complaint as it is written.

Judgment affirmed.

Filed April 12, 1890; petition for a rehearing overruled June 20, 1890.

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Bowen v. Wickersham et al.

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No. 14,252.

**BOWEN v. WICKERSHAM ET AL.**

**MORTGAGE.—Foreclosure.—Sheriff's Deed.—Description.**—Where the land sold in pursuance of a decree of foreclosure is described in the decree and deed as a certain twenty-acre tract of land, "except such portions \* \* as have heretofore been laid out in town lots, \* \* and have been sold and conveyed prior to the execution of the mortgage," the deed is void for uncertainty, since it would be necessary in order to determine what property was in fact sold to institute an extraneous inquiry.

**REAL ESTATE.—Action to Recover.—Sheriff's Sale.—Deed.—Insufficient Description.**—In order to maintain ejectment, the burden is upon the plaintiff to make out a title to the land in dispute in himself, and where he claims through a judicial sale it must appear from the decree and deed, through which he claims, without the aid of extrinsic evidence, that the title to the lot in controversy is in him. If the decree and deed are so defective that it can not be ascertained by inspection, or from any data contained therein, what property was in fact sold, or if in order to ascertain the intention of the officer in selling, it becomes necessary to institute an extraneous inquiry, the deed is void.

From the Carroll Circuit Court.

*J. Applegate* and *C. R. Pollard*, for appellant.

*W. C. Smith* and *G. W. Julian*, for appellees.

**MITCHELL, J.**—Bowen sued Wickersham and others, in ejectment to recover the possession of lot numbered 9 in the town of Mortonville, in Carroll county. The plaintiff's only claim of title rests upon a decree of foreclosure and a sale and conveyance made in pursuance thereof by the sheriff of Carroll county.

The essential part of the description of the land in controversy, as contained in the decree, advertisement and deed, is as follows: "Twenty acres out of the northwest fractional quarter of section twenty-nine, in township twenty-five north, of range two west, bounded as follows: Commencing at low water mark on the north bank of Deer Creek south of an oak witness-tree of the old survey; thence south parallel with the section line forty-seven and one-half rods;

thence south with the section line to Deer Creek; thence down said creek with the meanderings thereof to the place of beginning, \* \* \* except such portions of the above described tracts of land as have heretofore been laid out in town lots by James Roach, and have been by him sold and conveyed prior to the execution of the mortgage herein."

There was evidence tending to show that the lot in controversy was embraced by the general description above, and that it was one of the town lots laid out by Roach, but it did not appear whether it had been sold and conveyed at the time the mortgage mentioned in the decree was executed, nor is there anything in the record of the present case to indicate that the decree of foreclosure was taken upon a mortgage executed to the plaintiff. If it should be conceded that the general description of the twenty-acre tract, read in connection with the testimony of the surveyor, was sufficient, still there is nothing in the decree or deed to indicate whether or not the foreclosure sale and subsequent conveyance embraced the lot in controversy.

In order to maintain ejectment, the burden rests upon the plaintiff to make out a title to the land in dispute, in himself, and as he claims through a judicial sale, it must appear from the decree and deed, through which he claims, without the aid of extrinsic evidence, that the title to lot numbered 9 is in him.

It does not appear from the record that the lot in dispute was embraced in the foreclosure proceeding, nor in the sale and conveyance made by the sheriff to the plaintiff. In order to ascertain whether or not it was so sold and conveyed, it would be necessary to institute an inquiry outside of the record so as to ascertain the date of the mortgage upon which the decree was taken, and to determine whether or not the lot in controversy had been sold by Roach before that time.

A description in a deed or mortgage may be sufficient, even though it may be necessary on account of its imperfect

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or indefinite character, to aid the intention of the parties by averring and proving extrinsic facts. This rule has, however, no application to a description found in a decree of foreclosure, or in a conveyance made in pursuance thereof. Descriptions of land found in judicial decrees or sheriff's deeds can not be reformed or aided by invoking the chancery powers of the court. *Lewis v. Owen*, 64 Ind. 446; *Dale v. Travellers Ins. Co.*, 89 Ind. 473.

Where the description as contained in a mortgage or other instrument is imperfect or indefinite, the land actually mortgaged or conveyed should be accurately described in the bill or complaint to foreclose, and the description in the decree should be so reformed that the officer may know on what land to execute the order of the court. *Struble v. Neighbert*, 41 Ind. 344; *Jones Mort.*, section 1462. The sheriff must be able to identify the property from the description contained in the decree, and the purchaser can only be put in possession of the land definitely described in the deed. *Cunningham v. McCollum*, 98 Ind. 38; *Runnels v. Kaylor*, 95 Ind. 503.

If the decree and deed are so defective that it can not be ascertained by inspection, or from data which they furnish, what property was in fact sold, or if in order to ascertain the intention of the officer in selling, it becomes necessary to institute an extraneous inquiry, the deed is void for uncertainty. *Freeman Ex.*, section 281. Thus, where a tract of land had been laid off into town lots, some of which had been sold, it was held that a sale by the sheriff of the owner's interest in the land, described generally, was too vague to convey title to any particular lot. *Evans v. Ashley*, 8 Mo. 177.

It can not be ascertained from an inspection of the decree and deed, or from any data contained therein, whether lot numbered 9 was or was not sold to the plaintiff, and as it was incumbent on him to make out an affirmative title before his

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 Sharp *et al.* v. Malia *et al.*


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right to recover was established, the judgment for the defendant was right.

Judgment affirmed, with costs.

Filed June 20, 1890.

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 No. 14,362.

### SHARP ET AL. v. MALIA ET AL.

**SPECIAL FINDING.**—*Motion to Strike Out Parts of.*—*New Trial.*—A motion to strike out parts of a special finding is not authorized by any rule of practice. Where the court fails to find all the facts proven, or finds the facts contrary to the evidence, the remedy is by motion for a new trial.

**COUNTY COMMISSIONERS.**—*Drainage Proceedings.*—*Appeal.*—*Remanding of Cause.*—Where the appeal from the board of commissioners to the circuit court involves a particular matter embraced in one or more issues, it is the duty of the circuit court to try such matter *de novo*, and to render a final judgment thereon, after which the cause may be remanded to the board of commissioners for further proceedings in accordance with the judgment. Where, therefore, on appeal the questions for trial are the utility of a ditch and the legality of the order establishing it, and the circuit court upon a trial *de novo* finds in favor of the petitioners on the question of utility, and in favor of the appellants as to the other question, it has the right to remand the cause to the board, with directions to proceed according to its judgment.

From the Pulaski Circuit Court.

N. L. Agnew and B. Borders, for appellants.

**COFFEY, J.**—This was a proceeding before the board of commissioners of Pulaski county to establish and construct a public ditch.

Such proceedings were had before the board that it ordered the establishment and construction of the ditch for which the petitioners prayed, from which order the appellants here appealed to the circuit court. In the circuit court the cause was tried by the court, which made a special finding of the facts and stated its conclusions of law thereon.

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124	608
125	610
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138	112
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140	294
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145	269
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148	150
148	237
152	365
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155	180
124	407
158	447
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159	241
124	407
160	118
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168	50
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It appears from the special finding of facts that, on the 27th day of August, 1887, the appellees in this case filed with the auditor of Pulaski county a petition praying for the location of a public ditch in Jefferson township in said county, giving a description of the beginning, course and terminus of the same. At the September term of the board of commissioners of said county it appointed viewers to view and locate said ditch, if found of public benefit and utility. Said viewers filed their report in the auditor's office on the 29th day of October, 1887. The report found that the ditch would be of public benefit and utility, and it discloses the fact that the viewers located the same, and performed such other duties as were required of them by law. The ditch as located by the viewers passed through the lands of Mary J. Osgood and D. H. Price, among other land-owners, but neither the said Osgood nor the said Price was made a party to the proceeding to establish said ditch, by notice or otherwise. The court further found that said proposed ditch would be of public utility.

Upon these facts the court stated as a conclusion of law that the order of the board of commissioners of Pulaski county accepting the report of the viewers and establishing the ditch was irregular, erroneous and void.

Upon filing the special finding and conclusions of law thereon, the appellants moved the court to strike out so much of the special finding as related to the utility of the ditch, which motion was overruled.

The court thereupon entered judgment in favor of the appellants for their costs, and setting aside the order of the board of commissioners of Pulaski county establishing said ditch, and ordered the cause certified back to the board of commissioners for their action according to law.

The appellants moved the court to modify the judgment by striking therefrom so much as related to setting aside the order of the board of commissioners, and ordering the cause certified back for further action of said board, leaving a

simple judgment in favor of the appellants for costs. This motion was overruled, and the appellants excepted.

We are not favored with a brief by the appellees, and for that reason we are not informed as to the ground upon which the circuit court based its rulings in their favor.

We are not advised of any rule of practice which authorizes a motion to strike out parts of a special finding of facts. Should the court fail to find all the facts proven, or find the facts contrary to the evidence, the remedy is by motion for a new trial. *Levy v. Chittenden*, 120 Ind: 37.

If the court should find facts not involved in the issues, such facts would be disregarded, but no error could be predicated upon a motion to strike out part of the finding. The court did not err in this case in overruling the motion to strike out part of the special finding.

The only remaining question presented by the record for our consideration relates to the action of the court in remanding the cause to the board of commissioners for further action by that body.

It appears by the record that no final action had been taken by the board of commissioners at the time this appeal was taken. The viewers, for some reason not disclosed in the record, failed to mention in their report the names of two of the land-owners over whose land the ditch passed, and as a result they were not notified of the proceedings by the county auditor. Between the date of the order accepting and approving the report of the viewers, and the time fixed for the final report, this appeal was taken to the circuit court. As the report of the viewers did not contain the names of all the owners over whose land the ditch passed, it was error in the board to approve it and establish the ditch, but as the matter had not passed from their control, the question is, had the circuit court, when setting aside such erroneous order, the power to remand the case for further proceedings?

In the statute governing appeals from the board of commissioners to the circuit court, it is provided that "Such



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court shall make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board, with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises." Section 5778, R.S. 1881.

In the case of *McPherson v. Leathers*, 29 Ind. 65, and in the case of *Mandlove v. Pavy*, 33 Ind. 505, it was held that the circuit court could not remand a cause to the board of commissioners for trial and determination, but must finally determine it as an original action.

In the case of *Hardy v. McKinney*, 107 Ind. 364, the power of the circuit court to remand a cause to the board of commissioners was not denied, but it was held that the court before remanding such cause should try it *de novo* and render the proper judgment.

In the case of *Sunier v. Miller*, 105 Ind. 393, after quoting the provisions of the statute above set out, this court said: "The effect of such statute is to confer a very broad discretion upon the circuit court."

The case of *Bryan v. Moore*, 81 Ind. 9, is, in its facts, similar to the case before us. In that case the appellees filed a petition for the establishment of a ditch. Upon a trial the board of commissioners found that the proposed ditch was not of public utility, and dismissed the petition. Upon appeal to the circuit court the cause was tried by a jury who returned a verdict, to the effect that the ditch, if constructed, would be of public utility. Thereupon the court adjudged that the ditch was of public utility, and ordered that the cause be certified back to the board of commissioners with directions to appoint appraisers, as required by law. This court, in commenting upon the action of the circuit court, said: "The court did not err, we think, in overruling appellant's motion to modify the judgment by striking out these words, 'and this cause is ordered to be certified to the board of commissioners, with directions to appoint appraisers.'" After quoting the statute above set

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out, the court said: "It will be seen from this section of the statute, that the judgment of the court, in the particular complained of, was fully authorized by law, and we think that it was peculiarly the right and proper judgment in the case at bar."

The rule to be deduced from all these cases would seem to be that where the appeal involves a particular matter embraced in one or more issues, it is the duty of the circuit court to try such matter *de novo* and to render a final judgment thereon, after which the cause may be remanded to the board of commissioners for further proceedings in accordance with such judgment.

In proceedings of this kind the board of commissioners acquires jurisdiction over the subject-matter by the filing of the petition. It acquires jurisdiction over the parties interested by the report of the viewers, and the statutory notice issued by the auditor on such report. The questions for trial, on appeal, in this case, were the questions of utility and the legality of the order of the board in establishing the ditch. These questions were tried by the court *de novo* and it found in favor of the petitioners on the question of utility, and in favor of the appellants on the other question, and thereupon entered a final judgment setting aside the order of the county board establishing the ditch. This was a final disposition of all the questions involved in the appeal. It would have been more formal had the court remanded the cause with directions to appoint new viewers or to refer the matter to the old ones, but the appellants did not move to modify the judgment in this respect. The motion of the appellants called in question the right to remand the cause in any event. The court, we think, did right in overruling this motion. The circuit court having tried and finally determined all the questions involved in the appeal, had the right to remand the cause to the board of commissioners with directions to proceed according to its judgment.

Judgment affirmed.

Filed June 20, 1890.

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Laird et al. v. Davidson.

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No 14,253.

## LAIRD ET AL. v. DAVIDSON.

**FRAUDULENT CONVEYANCE.—Husband and Wife.—Title to Property Transferred.—Evidence.**—A wife brought an action against a constable and the creditors of her husband to recover the possession of personal property taken under execution against the husband. The theory of the defendants was that any title which the plaintiff had to the property was acquired through her husband in fraud of his creditors.

**Held,** that it was competent for the defendants to prove that a certain mare—part of the property levied upon—was kept in a stable which was under the control of the husband as tenant.

**SAME.—Husband and Wife.—Loan.—Promissory Note for.—Preference of Wife.**—From whatever source the wife acquired money, so that its acquisition was not tainted with bad faith, she had a right to loan it to her husband and take his promissory note therefor; and, when in failing circumstances, he had a right to prefer her to the exclusion of other creditors.

**SAME.—Civil Action.—Evidence.—Preponderance.**—In a civil action, whenever the plaintiff has a preponderance of evidence in his favor as to any fact as to which he has the *onus*, he is entitled to have that fact found in his favor.

From the Fountain Circuit Court.

*M. E. Clodfelter, J. A. Lindley, J. L. Griffiths and A. F. Potts*, for appellants.

*H. H. Dochterman, T. F. Davidson and J. W. Newlin*, for appellee.

**BERKSHIRE, C. J.**—This was an action instituted by the appellee to recover the possession of certain personal property.

John F. Davidson and the appellee were husband and wife, the appellant Laird was a constable of Cain township, Fountain county. John D. Moore had obtained a judgment against said John F. Davidson before a justice of the peace of said township. Rufus K. Syfers and Frank A. McBride had obtained two judgments before the same justice against said Davidson. Executions having been issued upon said judgments, they were placed in the hands of said constable, and

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by virtue of the authority therein given, he levied the same upon the said property.

Upon the issues joined the question presented for trial was as to whether the appellee or the said John F. Davidson was the owner of the property.

The question having been submitted to a jury, a verdict was returned for the appellee, and, over a motion for a new trial, judgment was rendered in accordance with the verdict.

The only error alleged to which our attention has been called rests upon the court's action in overruling the motion for a new trial. But several questions are presented for our consideration.

The theory of the appellants was that any claim or title which the appellee had or held to the property was acquired through her husband, and in fraud of his creditors.

On the trial of the cause the appellants offered to prove that a certain sorrel mare levied upon, before and at the time of the levy, was kept in a stable building which the said John F. Davidson had under his control as a tenant; that he paid the rent therefor, and took receipts for payments of rent in his own name. The trial court sustained objections to this evidence, and refused to hear it. In this ruling we think the court erred.

It is true the offered evidence may be regarded as somewhat insignificant in its character, but this court said long ago, that "Fraud may be deduced not only from deceptive or false representations, but from facts, incidents and circumstances, which may be trivial in themselves but decisive in the given case of a fraudulent design." *Peter v. Wright*, 6 Ind. 183.

While the circumstances which the appellants offered to prove would not, as between husband and wife, ordinarily be entitled to the same weight as in a case where that relation does not exist, it was a question for the jury to consider as to who had possession of the animal, and was exercising control over it; most certainly if the animal had been in

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the exclusive possession and control of the appellee after she claimed to have purchased it, this would have been a material circumstance for her to have proven.

In view of the other circumstances proven, and the rule as above stated, we are not at liberty to hold that the error was a harmless one.

We do not think that the court erred in refusing to give instructions numbered 5, 6, and 8, asked by the appellants. No difference from what source the appellee acquired money, so that such acquisition was not tainted with bad faith, she had a perfect right to loan it to her husband, and take his promissory note therefor; and thereafter, and when in failing circumstances, he had a right to prefer her to the exclusion of other creditors. We think these are not debatable questions. See *Dice v. Irvin*, 110 Ind. 561; *Wilson v. Wilson*, 113 Ind. 415.

The court committed no error in refusing to give the 7th instruction requested by the appellant.

The appellee was not required to establish any proposition involved in the issues by a greater weight of evidence than a preponderance.

This was a civil action, and whenever the appellee had the preponderance of evidence in her favor, as to any fact as to which she had the *onus*, she was entitled to have that fact found in her favor. See *Elliott v. VanBuren*, 33 Mich. 49; *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59.

The case of *Rowell v. Klein*, 44 Ind. 290, to which our attention has been directed, and from which the language of the instruction was borrowed, does not give the instruction support. There the question was as to whether or not the wife should be bound to her prejudice by the declarations and acts of her husband, on the theory that he was acting as her authorized agent; while, in the case at bar, we have the question reversed.

Sufficient reasons will readily occur to the mind of any

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court for demanding stricter proof in the one class of cases than in the other as to the fact of the husband's agency.

Cases of the class to which *Rowell v. Klein, supra*, belongs, for obvious reasons, may be regarded as exceptional, so far as the question of the husband's agency is concerned; but even in that class of cases the exception consists in the quality of the evidence necessary to establish the fact, and not in its degree.

We do not think the court erred in refusing to give the 9th instruction requested by the appellants, for the reason that the court, by its own instructions, covered the ground.

It is our opinion that the court erred in refusing to give instruction numbered 13.

If the Ellis notes, which made up the principal part of the consideration for the stock of goods levied upon, belonged to John F. Davidson, in that proportion he paid the consideration, and became *pro tanto* the owner of the property; and, as his property, it became subject to execution.

Upon the hypothesis embraced in the said instruction, John F. Davidson was the owner of the notes. The instruction was pertinent to the evidence.

Whether or not negotiable paper may be endorsed so as to pass the title thereto, without passing from the actual possession of the indorser, is a question we need not decide.

Because of the errors named, the judgment must be reversed.

Judgment reversed, with costs.

Filed June 20, 1890.

Lowman v. Sheets.

No. 14,067.

## LOWMAN v. SHEETS.

**SPECIAL VERDICT.**—*Request for Written Instruction.*—It is not error for the court to grant a request for a special verdict, which is made after the party preferring the request has asked the court to instruct the jury in writing, and after the questions of law to be embraced in the instructions have been discussed, as the court has the right to require the jury to return a special verdict without any request from either party.

**CONTRACT.**—*Statute of Frauds.*—*Contracts not to be Performed within One Year.*—*Performance by One of the Parties.*—The statute prohibiting the making of oral contracts not to be performed within one year, has no application to contracts which have been fully performed by one of the parties.

**SAME.**—*Lease.*—*Three Years or Under.*—A parol lease for a period not exceeding three years is not within the statute of frauds. Section 4904, R. S. 1881.

**SAME.**—A contract within the statute of frauds is not void, but voidable.

**SAME.**—*Brood Mares.*—*Keeping of.*—*Postponement of Settlement.*—A parol agreement made in 1877 by the vendee to keep mares for breeding purposes until 1891, each party furnishing a part of the feed, with a postponement of a settlement to the latter date, is within the statute of frauds.

**SAME.**—*Sale.*—*Delivery of Possession to Vendee.*—A parol contract of sale of a one-half interest in a certain number of mares, where the possession is delivered to the vendee, is not within the statute of frauds.

**SAME.**—Where there are a number of contracts made at the same time, and are parts of the same transaction, some of which are within the statute of frauds and the others not, and they are of such a nature that they can reasonably be considered as separate, those which are not within the statute will be enforced though the others may fall within the statute.

**PARTNERSHIP.**—*Property Kept for Carrying on the Business.*—*Sale of.*—Where the property of a partnership is kept for the purpose of carrying on a particular business, neither partner has the right to sell the entire property, the power of sale being confined to those things kept for sale.

From the Benton Circuit Court.

*W. D. Wallace, S. P. Baird and U. Z. Wiley*, for appellant.

*E. P. Hammond, M. W. Walker, D. Fraser, I. H. Phares and W. B. Austin*, for appellee.

124	416
128	248
124	416
140	497
143	208

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COFFEY, J.—This was an action by the appellant against the appellee to recover the possession of forty brood mares described in the complaint. The complaint alleges that he is the owner and entitled to the possession of the property, and that the appellee unlawfully detains the possession thereof from him.

The cause was submitted to a jury, who returned the following special verdict:

“STATE OF INDIANA, }  
BENTON COUNTY. } ss.:

“Benton Circuit Court, September term, 1887.

“JAMES A. LOWMAN }  
vs. } No. 1032.  
FREDERICK SHEETS. }

“We, the jury, having been instructed to return a special verdict herein, find the facts to be as follows:

“About the 8th day of April, 1887, one Leroy Templeton was the absolute owner of the forty mares in controversy in this case, and on that day bargained to the defendant Sheets a one-half interest in said mares, at and for the price of forty-five dollars for each of said mares, said mares in said bargain being valued at ninety dollars each.

“By the terms of said sale said defendant was to have possession and care and control of said mares, and was to keep the same until March 1st, 1891.

“Said Templeton was to furnish pasture for the same until October 1st, 1887, after which the feed for said animals was to be furnished at an equal expense of said Templeton and said defendant.

“Said defendant, from the time of making said bargain, was to look after and have the control and possession of said mares in the pasture furnished by said Templeton, up to October 1st, 1887, and was thereafter to continue to feed and take care of said animals, and to have the possession of the same. Said Sheets was to pay said Templeton interest at



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seven per cent. on the purchase-price of said mares from October 1st, 1887, and was to have the option to pay said purchase-money when he saw proper on or before March 1st, 1891. On March 1st, 1891, the interest of said parties in said mares, and the proceeds thereof, were to be equal, after accounting to each party for his portion of the expense, and also after payment to Templeton by the defendant of the purchase-price for the one-half interest thereof, with interest, if the same had not been previously paid.

"By the terms of said bargain, said mares were to be kept exclusively for breeding purposes, and were not to be worked or sold, broke or traded by either party prior to March 1st, 1891, except by consent.

"Said bargain was not in writing.

"Pursuant to said contract said Templeton, on the same day that it was made, to wit, about April 8th, 1887, delivered possession of said mares to said Sheets, who remained in the possession and care of the same, having the same in a pasture furnished by said Templeton, in said county, until the 16th day of June, 1887, when said Templeton and said plaintiff, without the knowledge or consent of said Sheets, took said mares from said pasture and placed them in a pasture of the plaintiff's, about half a mile distant from where they were taken.

"The possession of said property was taken by said Lowman under a sale made to him by said Templeton, on the 16th day of June, 1887, on which day said Templeton sold said property to said Lowman for the sum of thirty-four hundred dollars, to be paid by said Lowman in six months after said date, which was evidenced by a promissory note, executed by plaintiff to Templeton, payable in a bank in this State, which said note is still held by said Templeton, and is still wholly unpaid.

"Said Sheets had no notice, knowledge or information of said sale by Templeton to the plaintiff until after the same was made, and the possession of said property taken by the

plaintiff as aforesaid; nor did he ever afterwards consent to the same.

"On the 22d day of June, 1887, said defendant, without objection or resistance, took said mares from plaintiff's pasture, where plaintiff had put them, as aforesaid, and put them in his, said defendant's, own pasture, on Fowler & Van Natta's farm in said county, the same being about four miles from the pasture where said animals were when taken by the plaintiff as aforesaid, and about the same distance from the plaintiff's said pasture from which they were taken by the defendant as aforesaid.

"While said animals were in the possession of the defendant as aforesaid, said plaintiff, on the 22d day of June, 1887, before the commencement of this action, demanded said property of said defendant, but said defendant refused to deliver him the possession thereof.

"Said plaintiff on the same day commenced this action, and upon a writ of replevin herein issued and upon the plaintiff's undertaking, approved by the sheriff, said sheriff, on said writ, delivered said property to the plaintiff who, by virtue of said delivery of possession, has since retained and is now in the possession of said property.

"Said property is now of the aggregate value of \$3,400. At the same time of making the sale of a half interest in said mares to said Sheets, said defendant and said Templeton entered into a bargain whereby said Templeton was to lease to said Sheets 800 acres of real estate, owned by said Templeton, in said county, for the term of three years, to commence on the 1st day of March, 1888.

"Said lands were the north half of each of two adjoining sections owned by said Templeton, one lying immediately east of the other, and the southwest quarter of said east section—the precise location of said lands so leased was well understood and agreed to by the parties at the time of making said bargain.

"By the terms of said bargain said land was to be culti-

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vated in corn, oats, pasture and meadow, as said Sheets might determine, and as rent for the same said Sheets was to deliver to said Templeton, on said premises, one-third of the corn raised thereon in the crib, one-third of the oats in the bin, and three-fifths of the hay in the stack, and to pay \$2.50 per acre for all the pasture except thirty acres, for which no charge was to be made.

"Said Templeton was, before March 1st, 1888, to move a house from a designated part of said premises to another designated part thereof, and to put the same in a tenantable condition, at an expense of not exceeding \$300.

"At the same time that Templeton sold a half interest in said mares, as aforesaid, and at the same time that he leased said defendant said real estate as aforesaid, said Templeton and defendant entered into a bargain whereby it was agreed, by and between them, that such portions of the hay and grain as should be raised upon said leased premises by said defendant, as the parties should determine, should be fed to stock, which stock was to be purchased from year to year by said parties, with money to be borrowed by them jointly; and to be taken care of by said defendant on said premises, the expense of feeding the same to be borne by Templeton and the defendant equally, and the net profits thereof to be divided between them equally.

"Said mares were also to be kept on said leased premises after March 1st, 1888.

"None of said bargains were in writing.

"Said sale of a half interest in said mares, by said Templeton to said defendant, would not have been made if said Templeton had not at the same time leased said defendant said real estate as aforesaid; but said sale of said half interest in said mares to said defendant and said lease of said real estate were in nowise dependent upon said other contract, and would have been made though said other contract had not been made.

"If, upon the foregoing facts, the law is with the defend-

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ant, then we find for the defendant, that the property in controversy should be returned to him, or if return thereof can not be had, that he should have judgment for one-half the value of the mares described in the complaint.

"THOMAS S. LAMB, Foreman.

"But if, upon the foregoing facts, the law is with the plaintiff, then we find for the plaintiff, that he keep and retain possession of the property in controversy, and that he recover from the defendant one cent for his damages herein.

"THOMAS S. LAMB, Foreman."

The appellant moved the court for judgment in his favor, on the special verdict, which was overruled. The court sustained a motion by the appellee for judgment in his favor on this verdict, and rendered judgment for a return of the property.

The errors assigned are:

1st. That the court erred in overruling appellant's motion for judgment in his favor on the special verdict of the jury.

2d. That the court erred in overruling the appellant's motion for a *venire de novo*.

3d. That the court erred in overruling the appellant's motion for a new trial.

4th. That the court erred in overruling the appellant's motion to arrest the judgment.

5th. That the court erred in sustaining the appellee's motion for judgment in his favor on the special verdict of the jury.

The first objection with which we are met is, that the court erred in directing the jury to return a special verdict.

It appears by the record that after the close of the evidence in the cause, each of the parties requested the court to instruct the jury in writing, and to indicate before argument what instruction would be given. After the close of the argument in the effort to settle on the instruction, but before the court had announced its conclusion, the appellee re-

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quested that the jury be required to return a special verdict, which request was granted.

It is claimed by the appellant that by requesting the court to instruct the jury in writing, and by entering upon the discussion of the questions of law to be embraced in such instructions, the appellee waived his right to a special verdict, and that the court, for that reason, erred in granting his request.

It is unnecessary to decide whether it would have been error in the court to refuse the request of the appellee for a special verdict, coming at the time it did, but it was certainly not error to grant it. Indeed, the court had the right to require the jury to return a special verdict, without any request from either party. *Weatherly v. Higgins*, 6 Ind. 73.

It is earnestly contended by the appellant, in an able brief, that the contract found by the jury is within the statute of frauds, and that it is, therefore, void.

It is found by the jury, as we understand their verdict, that the contract to purchase stock, to be fed on the farm, has no connection with the other agreements between the parties, and, hence, that agreement does not call for any consideration at our hands. The contracts under which the question for decision arises are :

*First.* The contract by which Templeton sold to the appellee a one-half interest in the property in controversy for an agreed price, and delivered to him the possession.

*Second.* The contract by which Templeton leased to the appellee the land, described in the verdict, for the term of three years, and

*Third.* The contract by the terms of which the appellee was to keep the mares in controversy and breed them for a period of more than one year.

The sale and delivery of a one-half interest in the mares in controversy is not within the statute of frauds, because it was fully executed by Templeton.

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The statute prohibiting the making of contracts not to be performed within one year, has no application to contracts which have been fully performed by one of the parties. *Browne Statute of Frauds*, section 287; *Donellan v. Read*, 3 Barn. & Ad. 899; *Smith v. Neale*, 2 C. B. N. S. 67; *Holbrook v. Armstrong*, 10 Maine, 31; *Bell v. Hewitt*, 24 Ind. 280; *Wolke v. Fleming*, 103 Ind. 105.

Nor is the lease of the land within the statute of frauds, as the statute expressly exempts leases for a period not exceeding three years. Section 4904, R. S. 1881.

This is not an action by either party to enforce the contract. A contract within the statute of frauds is not void, but merely voidable. *Schierman v. Beckett*, 88 Ind. 52; *Day v. Wilson*, 83 Ind. 463.

In the latter case cited it was held that where a party had paid money on a parol contract for the purchase of land, the money could not be recovered back unless the vendor refused to convey.

It being settled that the contract for the sale of the property in controversy was not within the statute of frauds, and that it vested the title to the undivided one-half of the property in the appellee, the question arises as to what is the effect of the repudiation of the agreement to keep the property for a period of more than one year for breeding purposes by Templeton, when the appellee is ready and willing to carry out the contract on his part.

We think, for the purposes of this case at least, that it must be held that the agreement to keep the mares for breeding purposes until 1891, each party furnishing a part of the feed, with postponement of a settlement to that date, is within the statute of frauds, unless it be held that such contract creates a partnership. *Stephenson v. Arnold*, 89 Ind. 426; *Wolke v. Fleming*, *supra*.

If the contract between the parties created a partnership, then, according to some of the authorities, it is not within the statute. *Wood Statute of Frauds*, p. 500, section 281.

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But, conceding that the statute applies to this contract, did the repudiation of it by Templeton divest the title of the appellee to the property in controversy?

We are of the opinion that the contract to keep the mares involved in this suit until 1891, is so far separated from and independent of the other contracts found by the jury, that the repudiation of it by the appellant can not deprive the appellee of the benefits he has acquired under the other contracts which are not within the statute of frauds, without his consent.

Where there are a number of contracts, made at the same time, and as parts of the same transaction, some of which are within the statute of frauds and the others not, and they are of such a nature that they can reasonably be considered as separate, those which are not within the statute will be enforced though the others may fall within the statute. Browne Statute of Frauds, section 143, *et seq.*

In such cases it is not so important to ascertain whether the one contract would not have been entered into without the other, as to ascertain whether they are, in their nature, separate and distinct.

In this case if the contract had been for the leasing of the land described in the verdict for the period of three years, coupled with an agreement on the part of Templeton to build a house on the premises during the second year, it could not be reasonably contended that Templeton could defeat the appellee's tenancy by a refusal to erect the house, though it should plainly appear that the one contract would not have been made without the other.

So we think Templeton could not divest the title of the appellee in the mares in controversy by a refusal to carry out the agreement in relation to keeping them until 1891. It is probably true that the appellee could not maintain an action against him for such refusal, but we do not think this fact affects the title which the appellee acquired by a contract which is not affected by the statute of frauds.

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Having reached the conclusion that the appellee is the owner of an undivided interest in the property in controversy, it follows that appellant can not maintain this action unless he acquired the whole title to the same by his purchase from Templeton. *Mills v. Malott*, 43 Ind. 248; *Lacy v. Weaver*, 49 Ind. 373; *Branch v. Wiseman*, 51 Ind. 1; *Schenck v. Long*, 67 Ind. 579.

It is contended by the appellant that Templeton and appellee were partners, and that, as such, either partner had the right to sell the property owned by the firm, and confer a good title, and that by his purchase from Templeton he acquired the title to the whole of the property in controversy, and has a right to its possession.

We do not deem it necessary to decide whether the contract between the parties was one of partnership or not, as the appellant had no power to sell the entire property, whether it was held as partnership property or otherwise. The partnership, if one existed, was not one in which the parties contemplated a sale of the property here involved, but it was one in which this property was to be kept for the purpose of carrying on a particular business. In such case neither party had the power to sell the entire property. *Bates Partnership*, section 401; *Hewitt v. Sturdevant*, 4 B. Mon. 453; *Cayton v. Hardy*, 27 Mo. 536; *Mussey v. Holt*, 24 N. H. 248; *Hudson v. McKenzie*, 1 E. D. Smith, 358.

Mr. Bates, in his valuable work on Partnerships, in treating this subject in the section above cited, says: "But I have no doubt but that the power of sale must be confined to those things held for sale, and that the scope of the business does not include the sale of property held for the purposes of the business, and to make a profit out of it, and that this only is the true rule."

It follows from what we have said that the court did not err in overruling the motion of the appellant for judgment in his favor on the special verdict of the jury, nor did the



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Lowman v. Sheets.

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court err in sustaining the motion of the appellee for judgment in his favor on said verdict.

It is contended that the special verdict before us does not find on all the issues in the case, and for that reason the court erred in overruling the motion for a *venire de novo*, but we think the verdict covers all the issues presented by the pleadings in the cause, and that it is not subject to the objection urged against it.

The court, over the objection of the appellant, permitted the appellee to prove certain declarations, made by himself, in relation to the ownership of the property in controversy. But these declarations were made while in possession of the property, and under the rule, as settled in the cases of *Bunnell v. Studebaker*, 88 Ind. 338, *Kuhns v. Gates*, 92 Ind. 66, *McConnell v. Hannah*, 96 Ind. 102, and *Creighton v. Hoppis*, 99 Ind. 369, they were admissible as part of the *res gestæ*. *Durham v. Shannon*, 116 Ind. 403.

Finally, it is contended by the appellant that the verdict of the jury is not supported by the evidence. We have read the evidence carefully, and while it is conflicting there is evidence in the record fairly tending to support the verdict. Its weight was for the jury. We can not disturb the verdict on the weight of the evidence.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed March 22, 1890; petition for a rehearing overruled June 20, 1890.

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The Louisville, New Albany and Chicago Railway Company v. Corps.

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No. 14,457.

**THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY  
COMPANY v. CORPS.**

**MASTER AND SERVANT.**—*Assumption of Risk.*—*Pleading.*—An employee can not recover from the employer for an injury produced by some cause incident to the nature of his services, and the master is not responsible for the known risks incident to the service in which the servant engages. In such a case, in order to make a good complaint, it must be averred that the plaintiff had no knowledge of the danger. An allegation that the plaintiff was free from fault does not take the place of averments showing that the risk was not one knowingly assumed as an incident of his service.

**PLEADING.**—*Paragraph of Complaint.*—*Questioning of by Assignment of Error.*—An attack upon one of several paragraphs of a complaint made for the first time in the assignment of errors will be unavailing, even though the paragraph assailed may be radically defective.

From the Clark Circuit Court.

*G. W. Friedley, J. K. Marsh and W. H. Watson, for appellant.*  
*M. Z. Stannard and F. B. Burke, for appellee.*

**ELLIOTT, J.**—It has been often ruled by this court that an attack upon one of several paragraphs of a complaint made for the first time in the assignment of errors will be unavailing, even though the paragraph assailed may be radically defective. This settled doctrine renders it unnecessary for us to consider the objection urged against the first paragraph of the appellee's complaint.

The second paragraph of the complaint was assailed by demurrer in the court below, and we are required to give judgment upon it. The paragraph named alleges that the plaintiff was in the service of the defendant as a laborer in its repair shops at New Albany; that the defendant negligently employed an inexperienced, unskilful and incompetent person to superintend and direct the work in its shop, and the work upon which the plaintiff was engaged at the time of his injury; that the work which the plaintiff was then performing was that of moving the large driving wheels of one of the defendant's locomotives; that the defendant

124	427
127	51
124	427
132	113
132	342
132	446
133	242
134	427
134	156
134	344
135	365
124	427
143	576
124	427
144	153
147	567
124	427
154	154
124	427
160	271
124	427
161	686
162	94
124	427
164	651
124	427
170	378

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The Louisville, New Albany and Chicago Railway Company v. Corps.

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negligently failed to provide a sufficient number of men competent to do the work of moving such wheels; that the defendant negligently failed to furnish sufficient machinery for such work, in that it failed to furnish blocks to hold such wheels; that, by reason of the careless and negligent acts of the defendant, a pair of driving wheels of one of its locomotives ran upon the plaintiff's hand and arm and so injured them as to deprive the plaintiff of their use; that the driving wheels ran upon the plaintiff without fault on his part, and the injury to him could not have been avoided by the exercise of care or prudence on his part.

It is settled law that an employer must use reasonable care to provide his employees with safe working places and appliances. It is also settled that the employer must use reasonable care to select competent and skilful persons for service. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Cincinnati, etc., R. W. Co. v. Lang*, 118 Ind. 579; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124; *Lake Shore, etc., R. W. Co. v. Stupak*, 123 Ind. 210; *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588. But it is quite as well settled that an employee can not recover from the employer for an injury produced by some cause incident to the nature of his services, and that the master is not responsible for the known risks incident to the service in which the servant engages. For anything that appears in the complaint the peril was a known incident of service and was one assumed by the plaintiff, and if it was there can be no recovery. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20; *Pennsylvania Co. v. O'Shaughnessy*, *supra*, and cases cited. In order to make a good complaint, in such cases as this, it is essential that it should be averred that the plaintiff had no knowledge of the danger, since if he did have knowledge and voluntarily continued in the master's service, he is deemed to have assumed the risk as an incident of his service. *Louisville, etc., R. W. Co. v. Sandford*, 117 Ind. 265; *Brazil Block Coal Co. v. Young*, 117 Ind. 520; *Lake*

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The Louisville, New Albany and Chicago Railway Company v. Corps.

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*Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Philadelphia, etc., R. R. Co. v. Hughes*, 119 Pa. St. 301; *Wilson v. Winona, etc., R. R. Co.*, 37 Minn. 326; *Gaffney v. New York, etc., R. R. Co.*, 15 R. I. 456. Remaining in the master's service with knowledge of the dangers of the service is not simply contributory negligence, for, as Mr. Beach says: "He [the servant] is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury." Beach Cont. Neg., section 140. There is in such a case no right of recovery, for the employer is absolved from liability. It is, therefore, a necessary conclusion, as shown by the authorities to which we have referred, that the allegation that the plaintiff was free from fault does not supply the place of averments showing that the risk was not one knowingly assumed as an incident of his service. It may be true that an employee exercises the utmost care, and yet be true that the risk assumed was an incident of the service in which he engaged.

We are here dealing with a question of pleading, and not of evidence. There is, as is well known, an essential difference between matters of pleading and matters of evidence; in pleading, facts must be directly and positively averred, while as matter of evidence conclusions may be inferred, without positive statements, from facts and circumstances. In pleading, it is incumbent upon the plaintiff to state all the facts essential to a cause of action, and if any material fact is lacking the complaint will go down before a demurrer. A material fact is here absent, and that is the fact that the danger was not an incident of the service in which the plaintiff voluntarily engaged. This fact must be averred, as the rules of pleading require, although if the question were one of evidence it might be inferred.

Judgment reversed.

Filed June 20, 1890.

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Wheatley v. Romack, Surveyor.

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No. 15,516.

**WHEATLEY v. ROMACK, SURVEYOR.**

**DRAINAGE.—Repair of Drains.—Allotments to Land-Owners.—Statute Construed.**—Under section 2 of the act entitled "An act prohibiting the obstruction of ditches or drains, providing a method of keeping them in repair," etc. (Acts 1889, p. 53), it is the duty of the county surveyor to allot to each tract of land benefited by a ditch constructed before its passage the portion of the ditch which in his judgment the owner of such land should keep in repair, except in cases where an allotment has been made by reviewers. Allotments made by the viewers may be ignored by the surveyor, such allotments not having been excepted from the operation of the act.

From the Tipton Circuit Court.

*T. H. Palmer and W. F. Palmer*, for appellant.

*W. R. Oglebay, G. H. Gifford and J. M. Fippen*, for appellee.

**COFFEY, J.**—Section 2 of an Act entitled "An act prohibiting the obstruction of ditches or drains, providing a method of keeping them in repair, and providing a penalty for the violation thereof," Acts of 1889, p. 53, is as follows: "As soon as practicable after the passage of this act it shall be the duty of the county surveyor in each county in this State, in which any such ditch or drain or part thereof is located, to proceed to view and examine each and every such ditch or drain within his respective county, and to fix and determine the portion thereof that the owner of each tract of land and each corporation, county or township assessed for the construction thereof should annually clean out and keep in repair, and shall also at the same time set apart and apportion to each parcel of land, and to each corporate road or railroad, and to the township where public highways are benefited, a share or portion of such ditch or drain, according to the benefits to be received thereby, to be cleaned out annually and kept in repair by the owner of each tract of land, or by such corporate road or railroad, or by the town-

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Wheatley v. Romack, Surveyor.

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ship. Such surveyor shall, whenever practicable, locate such share or portion of such ditch upon such tract of land, or upon the right of way of such corporate road or railroad, or on the highway on account of which such share is allotted to the township. In making such allotments such surveyor shall begin at the mouth of the ditch and give the location of each share, its number and length in feet, and a brief description of the manner in which the work shall be done. Each ditch or drain shall be cleaned out to a depth and width not less than its original specification: *Provided*, That where ditches were originally allotted for construction by reviewers appointed by the board of county commissioners, the allotments shall remain the same for repairs under this act, unless a majority of the parties assessed shall petition the surveyor for a reapportionment under the provisions of this act, in which event the same proceedings shall be had as in other cases." Section 3 of this act provides that the surveyor shall reduce the allotments to writing, and that he shall record the same in a book kept for that purpose. He is required to give ten days' notice of the time and place when and where he will hear all objections that may be made to such allotments.

Section 4 provides that after hearing all objections that may be offered to such allotments, such surveyor shall confirm or change the same as justice may require, and shall enter an order accordingly, which shall be final and conclusive upon all parties interested, unless appealed from in ten days thereafter.

Acting under the provisions of this statute, the appellee, as the surveyor of Tipton county, allotted to the lands of the appellant certain portions of a ditch running through the same, to be kept in repair by the appellant. At the time fixed by the appellee to hear objections to allotments the appellant appeared and filed the following objections to the allotment assigned to his land, viz. :

"To James L. Romack, surveyor of Tipton county. I

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Wheatley v. Romack, Surveyor.

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make the following objections to your allotment of a part of Dixon Creek Ditch No. 19 to me to repair and to keep in repair:

"1. Dixon Creek Ditch No. 19 was constructed under the provisions of the act of the Legislature, approved March 9th, 1875, and was originally allotted for construction by viewers appointed by the board of commissioners of Tipton county, Indiana; that the allotment now made by you to my land is not the same as that originally made by said viewers; that the allotment now made is much greater in length than said original allotment, and a majority of the parties assessed have not petitioned you for a re-appraisement.

"2. You have allotted to my lands a portion of said ditch greater than a just apportionment thereof.

"3. The part of said ditch which you have added to my allotment was not completed according to the specifications originally made for said ditch.

"4. The original allotment to my lands on said ditch was 1693 feet, commencing 78 feet above stake No. 139, and extending down said ditch to a point 15 feet below stake No. 155. Your allotment to the same lands is 3139 feet."

The surveyor overruling these objections, the appellant appealed to the circuit court, where a demurrer was sustained to the objections numbers one, three and four, and overruled to the second. Upon a withdrawal of the second objection the appellee had judgment for costs.

The question involved in the case, and requiring a decision, relates to the construction of the second section of the statute above set out. It is contended by the appellant that all ditches constructed under the act of 1875, and under the statutes of 1881, section 4285, must remain for repairs as originally allotted, unless a majority of the land-owners to whom allotments were made shall petition the surveyor for a re-allotment.

It is claimed that the proviso in said section should be read as containing both the words "viewers and reviewers."

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Wheatley v. Romack, Surveyor.

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We recognize the rule that in construing a statute it is proper to look to other statutes, to the rules of the common law, to the source from which the statute was derived, to the general principles of equity, to the object of the statute, and to the condition of affairs existing when the statute was adopted. *Humphries v. Davis*, 100 Ind. 274; *Middleton v. Greeson*, 106 Ind. 18; *Miller v. State, ex rel.*, 106 Ind. 415; *Stout v. Board, etc.*, 107 Ind. 343.

There are three points to be considered in the construction of all remedial statutes—the old law, the mischief and the remedy. *State, ex rel., v. Denny*, 67 Ind. 148. In all cases the object sought is to ascertain the intention of the Legislature. *Krug v. Davis*, 87 Ind. 590.

In the construction of statutes the intention of the Legislature must govern, and in ascertaining that the courts will look to the letter of the statute, to the statute as a whole, to the circumstances under which it was enacted, to the old law, if any existed, to the mischief intended to be remedied, and all like matters, and will make such application of the provisions of the statute as will best promote the object of its enactment. *Hunt v. Lake Shore, etc., R. W. Co.*, 112 Ind. 69.

Upon an examination of the statute of 1875, as well as the statute of 1881, providing for the establishment of ditches and drains under proceedings instituted before the board of commissioners of the several counties of the State, it will be found that such statutes provide for the appointment of reviewers in such proceedings in certain cases. Such reviewers are appointed after the viewers have performed their work and made their report, upon a remonstrance filed by some interested party. The reviewers have the same power as the viewers, to apportion or allot to the land benefited by the construction of the ditch the amount it should pay for such construction.

The section of the statute now before us for construction requires the county surveyor to apportion or allot to each



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 Smith *et al.* v. Harbin.
 

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tract of land benefited by a ditch constructed before its passage the portion of the ditch which in his judgment the owner of the land should keep in repair, except in cases where an allotment has been made by "reviewers." An allotment made by viewers is not an allotment made by reviewers. What reason prompted the Legislature to except from the act allotments made by reviewers, and to include allotments made by viewers, we need not inquire. That it has done so there seems to be no doubt. Without adding an exception, which the Legislature did not choose to make, we can not say that the surveyor may not ignore an allotment made by viewers. To add this exception would, in our opinion, be judicial legislation. In our opinion it is the duty of the surveyors of the several counties in this State, where public ditches exist, to allot to each tract of land benefited by such ditch the quantity the owner of such land should keep in repair, except in cases where an allotment has been made by reviewers.

Judgment affirmed.

Filed June 21, 1890.

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No. 14,223.

SMITH ET AL. v. HARBIN.

PRINCIPAL AND SURETY.—*Judgment not Disclosing Suretyship.—Subrogation.*

—A judgment was rendered against S. and H. before a justice of the peace and a lien obtained upon the real estate by the filing of a transcript. S. afterwards mortgaged the land to Y. to secure a debt. The mortgage was foreclosed, Y. becoming the purchaser at the sheriff's sale. The judgment obtained against S. and H. did not disclose H.'s suretyship, and Y. had no knowledge that he was surety. H. having paid the judgment after the mortgage was given, sought to have himself declared a surety and subrogated to the lien of the judgment creditor.

*Held*, that as against Y., to whom the mortgage was given after the ren-

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Smith *et al.* v. Harbin.

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dition of the judgment and before its payment, he is not entitled to subrogation.

From the Knox Circuit Court.

*W. A. Cullop* and *G. W. Shaw*, for appellants.

*T. R. Cobb* and *O. H. Cobb*, for appellee.

OLDS, J.—This is an action brought by the appellee, James A. Harbin, against the appellants, Frederick A. Smith and John P. Young, to recover a judgment for money paid by him as surety on a judgment against said appellant Smith and the appellee, and to have a lien declared on real estate owned by said Smith at the time of the rendition of the judgment, but now owned by the appellant Young.

Appellant Young demurred to the complaint, and his demurrer was overruled, to which ruling he excepted, and assigns the same as error.

The averments in the complaint are, in substance, as follows: That, on the 1st day of September, 1884, the appellant Smith as principal, with William Donaldson and the appellee as his sureties, executed a promissory note to one William H. C. Lingo, whereby they promised to pay to said Lingo four months after date the sum of \$100, for value received, without relief from valuation or appraisement laws, with interest thereon at the rate of eight per cent. per annum from maturity, and attorney's fees; that said note was not paid at maturity, and, on the 2d day of February, 1885, the said Lingo instituted an action on said note before Hannibal Young, who then was a justice of the peace in and for Steen township in said county, against the makers of said note, to recover the amount due thereon, and such proceedings were had in said action before said justice that, on the 6th day of February, 1885, the said Lingo obtained a judgment before said justice against said Smith, Donaldson and the appellee for the sum of \$110.80, together with costs taxed at \$5.40, and accruing costs amounting to \$13; that, on the 7th day of February, 1885, said Lingo filed a certified transcript in

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*Smith et al. v. Harbin.*

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the office of the clerk of the Knox Circuit Court in said State; that the filing of said transcript in the clerk's office by said Lingo was to make said judgment a lien on the real estate of the judgment defendants Smith, Donaldson and this appellee, situated in said Knox county, the same as judgments rendered in said circuit court are liens on real estate within said county, and said clerk forthwith duly recorded said transcript and docketed said judgment; that, on said 9th day of February, 1885, the said Smith was the owner in fee simple of certain real estate in said county, a description of which real estate is set out; that, on the 28th day of February, 1885, the said appellant Smith was indebted to the said appellant John P. Young in the sum of \$500, and on said day said Smith and his wife executed a mortgage upon said real estate to said Young to secure the payment of said indebtedness when the same became due; that the note which was given by said Smith to Young for said debt became due March 1st, 1885; that on the 30th day of August, 1884, the said appellant Smith and his wife Zarelda Smith executed a mortgage upon said real estate to the board of trustees of the Vincennes University, to secure the payment of a note given by said Smith to the board of trustees of said university on the same day for the sum of \$800, and that said note was due and unpaid to said board on the 10th day of April, 1886, and said board of trustees on said day instituted an action in said Knox Circuit Court against said appellant Frederick A. Smith, Zarelda Smith, his wife, and the appellant John P. Young, to obtain a foreclosure of their said mortgage and an order of sale of said real estate to satisfy said indebtedness of said Smith to said board of trustees, and said John P. Young was made a party defendant because he was a junior mortgagee, holding a mortgage on said real estate, and to answer as to any other interest he might have in or to said real estate; that said Young filed a cross-complaint in said action, setting up his note and mortgage securing the same as aforesaid, and asked for a foreclosure of the

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mortgage and an order of sale of the real estate to satisfy the same; that such proceedings were had in such action for foreclosure that, on the 3d day of May, 1886, the said court rendered a judgment and decree of foreclosure in favor of said board of trustees for the sum of \$922.40, and that the same was a prior lien to said mortgage of said Young thereon, and a judgment and foreclosure in favor of said Young for the sum of \$133.70, which was declared to be a junior lien to the said amount in favor of the said board of trustees; that a decree of foreclosure issued on said judgment to the sheriff of Knox county, and the sheriff duly advertised the said real estate for sale on the 12th day of June, 1886, and on said day the sheriff sold the same to said appellant Young, and issued to him a certificate therefor; the same not having been redeemed within one year, at the expiration of the time for redemption said sheriff executed to said Young a deed therefor; that, on the 30th day of December, 1885, said appellee paid the sum of \$125 to the clerk of said court in full of said judgment in favor of said Lingo; that said appellant Smith and Donaldson are notoriously insolvent, and have not sufficient property subject to execution to satisfy said judgment; that said real estate is worth the sum of \$3,000; that said sum of money so paid by the appellee in full of said judgment in favor of Lingo is a lien on said real estate, and the said sum of \$125 so paid by him as aforesaid is still due and unpaid. Prayer for judgment for \$150, and that the same be declared a lien on said real estate, and prior to any right or title thereto obtained by the defendant Young by virtue of the foreclosure and sale under said mortgage so executed by said Smith and wife to him, and that said lien be enforced and said property sold for the satisfaction thereof.

The judgment, as set out in the complaint in favor of Lingo, was a lien in favor of the plaintiff Lingo, on the real estate afterwards mortgaged to appellant Young, but until it was modified, and until a judgment had been rendered

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Smith *et al.* v. Harbin.

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finding and adjudicating that the appellee Harbin was surety on such judgment, no right existed in favor of the said Harbin to enforce the judgment rendered in favor of Lingo, as the judgment was rendered, it did not disclose Harbin's suretyship, and *prima facie* Harbin was a principal debtor, and the judgment conveyed no notice to Young that he had any rights as surety for his co-judgment debtors, and a payment by Harbin *prima facie* satisfied the judgment.

In *Kreider v. Isenbice*, 123 Ind. 10, it is held that an action by a surety, who has paid a judgment, to recover the amount paid, is barred in six years, and that when a judgment is rendered against the makers of a note, without disclosing the suretyship, and is paid by one of the judgment defendants, although in fact a surety, it is a *prima facie* satisfaction of such judgment; that when a surety pays a debt he has the right to be subrogated to the rights of an obligee whose claim he has paid, but that the action is based upon an implied promise of the principal to indemnify his surety.

As appears by the averments of the complaint, Smith, the judgment debtor, owned certain real estate; he first mortgaged it to secure a debt he was owing to the board of trustees of the Vincennes University; then Lingo filed a transcript, and obtained a lien upon it; then Smith mortgaged it to Young to secure a debt he owed to Young; the two mortgages were foreclosed and the real estate sold to satisfy them, and Young, the junior mortgagee, became the purchaser.

If, at the time of the rendition of the judgment, or at any time prior to the execution of the mortgage to Young, the appellee had filed a complaint, as contemplated by section 1212, R. S. 1881, and had the question of suretyship tried and determined, and judgment rendered in his favor as surety, he would have thereby acquired a right to have been subrogated to the lien existing on the real estate in favor of the judgment plaintiff, and which he could have enforced by execution, as provided by section 1214; but until such finding was made, and judgment declaring him to be surety was ren-

## Woodward v. Murdock.

dered, no right existed in favor of him' as surety to enforce the judgment. If this cause is prosecuted to final judgment it is then by virtue of the judgment in this suit and the judgment entered in this cause that the appellee is declared a surety, and the lien which he obtains by this judgment attaches at the date of its rendition, and can not be antedated so as to become a prior lien to the mortgage in favor of Young. It is questionable whether the remedy prescribed for sureties by sections 1212, 1213, and 1214, R. S. 1881, must not be sought by a surety entitled thereto in the court wherein the original action is brought, by the creditor, to collect the debt. But the surety in this case, the appellee, can, no doubt, prosecute his action in the circuit court against Smith to recover the amount paid for him as surety; but as against the appellant Young he has no right of action, and no judgment rendered thereon can be made a lien to antedate the mortgage of Young, or affect his title derived by virtue of the sheriff's sale on the decree of foreclosure. The demurrer of Young to the complaint should have been sustained, and the court erred in overruling the same.

Judgment reversed, at costs of appellee, with instructions to sustain the demurrer of Young to the complaint.

Filed June 21, 1890.

No. 15,562.

## WOODWARD v. MURDOCK.

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149	617
149	632

**CONVICT.—Parole.—Violation of Conditions.—Pardon.—Credit for Good Conduct.—Release.—Prisoner When Entitled to.**—On the 25th of May, 1885, the appellant was sentenced to imprisonment for a term of five years. On the 17th of March, 1888, he was released from imprisonment on parole, but was recommitted to prison October 21st, 1889, at the command of the Governor, for a violation of the terms of the parole. Un-

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der the act allowing convicts good time the prisoner would have been entitled to his release on December 12th, 1889.

*Held*, that the parole by the Governor did not have the effect of an unconditional pardon, but was a mere parole, and that upon a violation of its conditions, which the prisoner had accepted, and which made the Governor the sole judge of the breach of the parole, the Governor had the power to order his recommitment to prison.

*Held*, also, that under section 1, Acts 1883 (Elliott's Supp., section 2026), allowing convicts credit for good time, the prisoner was not entitled to credit for good time during his absence on parole.

*Held*, also, that the prisoner was entitled to his discharge at the expiration of the time for which his sentence ran, less the time for which he was entitled to credit as good time earned, although for a part of the time covered by the sentence he was absent on parole, the conditions of which he violated.

From the La Porte Circuit Court.

*W. W. Herod* and *W. P. Herod*, for appellant.

*L. T. Michener*, Attorney General, *J. W. Crumpacker* and *J. H. Gillett*, for appellee.

BERKSHIRE, C. J.—The facts presented by the record in this case are as follows:

On the 25th day of May, 1885, the appellant was sentenced by the judgment of the Marion Criminal Court on a charge of embezzlement to imprisonment in the northern penitentiary of the State for a term of five years from that date; he was immediately conveyed to the prison and continued as an inmate thereof until the 17th day of March, 1888, at which time he received a parole from the Governor of the State. In accordance with said parole the appellant was relieved from imprisonment in said prison and remained away therefrom until the 21st day of October, 1889, when at the command of the Governor he was again remanded to said prison and has continued as an inmate thereof since that time; the cause of his re-imprisonment, as asserted by the Governor, being a violation of the conditions on which he was paroled. From the time of his imprisonment to the date of his parole the appellant had earned good time equal

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Woodward v. Murdock.

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to five and thirteen-thirtieths months under the provisions of section 1 of the act of 1883, found in Elliott's Supplement as section 2026, and had he continued an inmate of said prison during the time he was out on parole he would have been entitled to a final release on the 12th day of December, 1889, and before the beginning of this proceeding, as it is not claimed that he had forfeited any part of said good time as provided in section 2 of said act.

The following propositions arise for our consideration and determination :

1. Was the appellant entitled to credit for good time during his absence from the prison in addition to that earned while an inmate of the prison ?

2. What was the effect of the parole issued by the Governor? Was it, in contemplation of law, an unconditional pardon, or what it purported and was intended to be, a mere parole? And if but a parole, was the appellant subject to re-imprisonment at the will of the Governor without a hearing before some judicial tribunal?

3. Was the appellant entitled to his final release at the expiration of five years less the time for which he had credit because of good time to his credit ?

It is very clear, we think, that the appellant could not earn good time while away from the prison. The right to credit for good time is purely a statutory right, and can only be acquired in the manner and under the circumstances pointed out by the statute. The language of the statute is, "That every convict who is now in, or may hereafter be confined, in the penitentiaries of the State of Indiana, \* \* and who shall have no infractions of the rules or regulations of the prisons or laws of the State recorded against him, and who performs in a faithful manner the duties assigned him," etc. It is only necessary to say that the language of the statute forbids its application to a prisoner when out of prison on parole.

A prisoner can not be out of prison and at the same time



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confined in prison; and when out of prison he can have no infractions of the rules and regulations of the prison recorded against him, nor can duties be assigned to him as a prisoner.

It is contended on the part of the appellant that the Governor's parole had the same legal effect as an unconditional pardon, and, therefore, that his arrest and imprisonment thereafter were without authority of law. We can not agree to this contention.

Under the Constitution of our State the pardoning power is vested in the Governor, subject to such rules and regulations as may be made by law. Section 17, article 5.

The legislative department has not legislated on the subject, and it therefore follows that the power of the Governor in this direction is supreme.

Having unlimited power he may grant paroles, conditional pardons and unconditional pardons. If this were not so his power would not be unlimited.

We understand it to be a rule that is axiomatic, that when a governmental department is given unlimited power in a particular direction, it may exercise such power in a greater or less degree, as to it may seem best. But were the power of the Governor limited to the right to grant unconditional pardons, the cause of the appellant would not be helped, for in that case the action of the Governor in granting a parole was unauthorized and ineffectual, and the appellant was, in contemplation of law, absent from the prison without leave; his absence amounted to an escape, and he was subject to be captured at any time by any person.

The appellant did not receive the parole as of right, but as a matter of grace, and hence it extended no further than its terms indicated, and the appellant received it subject to all of the conditions which it imposed.

The conditions of the parole are as follows: "This parole is granted upon the express condition that the prisoner be of good conduct, not violate the law, and that upon his dis-

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charge from prison he shall leave and remain out of the State during the time for which he was sentenced, and the Governor shall be the sole judge of any violation of said condition, and reserves the right to revoke the same at any time upon either of the above conditions becoming broken. The prisoner, before his release, shall endorse on this parole his acceptance of the same upon the conditions therein stated." And in accordance with said last requirement the appellant executed his acceptance of all the said conditions by endorsement on the back of said parole as follows :

"I herewith accept the written conditions of this parole, this 17th day of March, 1888.

"JOHN T. WOODWARD."

The appellant, as well as the Governor, recognized the act of the latter as but the granting of a parole.

As we have already said, the Governor had authority to grant the parole, but as he did it as a matter of grace, and not as a duty, it was his right to impose such conditions as he saw proper, and when the appellant accepted it he, by implication, as well as by express agreement, did so subject to all of its terms and conditions.

We have examined the following authorities cited by the Attorney General, and find them pertinent: *Ex Parte Wells*, 18 How. 307; *United States v. Wilson*, 7 Pet. 149; cases cited on page 481 of 6 Crim. Law Mag.; *State v. Smith*, 1 Bailey Law (S.C.) 283 (19 Am. Dec. 679); *Ex Parte Lockhart*, 1 Disney (Ohio), 105; *State v. Fuller*, 1 McCord (S. C.), 178; *Flavell's Case*, 8 Watts & S. 197; *Arthur v. Craig*, 48 Iowa, 264.

Under the circumstances, the appellant was at large merely at the will of the Governor.

The Governor had it in his power to order the appellant to prison at any time.

In *Turner v. Wilson*, 49 Ind. 581 (586), BIDDLE, J., said: "In the quaint language of the old books, 'the bail have their principal always upon a string, and may pull the string

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whenever they please, and render him in their own discharge.' ”

This quotation expresses exactly the relation which the appellant occupied to the Governor.

We think the appellant was entitled to his discharge at the expiration of five years from the date of his sentence less the time for which he was entitled to credit as good time earned.

During the time that he was out on parole he was not a free citizen ; he was, as we have seen, still a prisoner, and notwithstanding his prison bounds were not so contracted as were the prison bounds of the insolvent debtor, at the time our laws recognized imprisonment for debt, still he was given prison bounds. He was not permitted to come into the State of Indiana. All the consequences of the judgment were upon him, except that he had leave of absence from the prison. As the appellant was a prisoner absent from the prison by proper authority, under no view of the case, in our opinion, could his imprisonment be continued longer than the period for which he was sentenced less his credit for good time. But if the appellant is to be regarded as having been a free man during the time he was out of prison on parole, he was entitled to his release at the time this proceeding was instituted. It was only by virtue of the judgment of the Marion Criminal Court that the appellant was held as a prisoner ; it by its very terms only condemned him for five years from its date less any time for which under the law he might be entitled to credit. See, also, section 6134, R. S. 1881. The law allowing him credit for good time entered into the judgment as if written therein, and, therefore, by the very language of the judgment the appellant's time expired on the 13th of December, 1889.

The appellant could not extend the time of his imprisonment by contract with the Governor any more than he could have become a prisoner in the first instance by contract. It is only by virtue of the judgment of a court of competent

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jurisdiction that a citizen can be condemned to imprisonment, and when the time expires for which the sentence runs, as given in the judgment, the prisoner is entitled to his discharge. This is not a new question in this court. See *Flora v. Sachs*, 64 Ind. 155. See article 5 of the Constitution of the United States.

The judge should have sustained the exceptions to the return.

Under the facts as presented by the record, the appellant was entitled to his discharge.

Judgment reversed, with costs.

Filed June 21, 1890.

No. 13,321.

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**SPECIAL JUDGE.**—*Adjournment of Term.*—*Power to Continue Trial Beyond.*—

Where a special judge is appointed to try a cause, and after the trial is commenced, the regular judge adjourns the term until the time fixed by law for holding the next regular term, the special judge has authority to proceed with the trial of the cause before him, after the order of adjournment made by the regular judge.

**SAME.**—*Extent of His Authority.*—When the regular judge yields the bench, calls in a special judge, and duly appoints him to try a designated cause, the special judge thus appointed, acquires full authority over the cause, throughout all of its stages, and the authority of the regular judge is necessarily excluded. Under the provisions of section 10 of article 7 of the Constitution, the Legislature has the power to provide for the appointment of special judges, and to make provision for investing such special judges with the authority of regularly chosen judges in the cases enumerated. *Batten v. State*, 80 Ind. 394, distinguished.

**EVIDENCE.**—*Part of not in Record.*—*Effect of as to Evidence Objected to.*—

Where all the evidence is not in the record, all reasonable intendments will be indulged in favor of the ruling of the trial court as to the admission of evidence. Under such circumstances, if the evidence objected to would have been admissible under any possible contingency, the Supreme Court will not hold that available error has been committed.

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**SPECIAL FINDING.**—*What it Must Contain.*—A special finding must find the facts, and state neither conclusions of law nor mere matters of evidence. The ultimate facts only must be stated.

**SAME.**—*Ditch Proceeding.*—*Statements as to Public Health and Public Highways.*

—The statement in a special finding in a ditch proceeding that the ditch would benefit the public health, is the statement of an ultimate fact, and not of a mere conclusion. The statement that it would benefit several public highways in Steuben and La Grange counties, is the statement of an ultimate fact, and not of a mere conclusion, but is probably so vague and indefinite as to be objectionable.

**DRAINAGE.**—*Establishment of Ditch.*—*What Must be Shown.*—The statute providing for the establishment of a ditch, does not require that a proposed ditch shall be of public utility, benefit highways and promote public health, for if it will accomplish any one of these things, the petitioners have a right to have it established, and if its construction will specially benefit lands in the vicinity, the cost of constructing it may be assessed against the lands.

From the La Grange Circuit Court.

*J. H. Baker and J. H. Defrees, Jr., for appellants.*

*J. Morris, J. S. Drake and F. D. Merritt, for appellees.*

**ELLIOTT, J.**—This appeal is prosecuted from a judgment establishing a ditch and assessing benefits upon the lands of the appellants.

A change of judges was secured upon due application, and Joseph B. Wade, Esq'r, was appointed a special judge to try the cause. The trial was entered upon before him as such judge on the third day of the September term of the court. On the fourth and last week of the term the regular judge adjourned the term until the time fixed by law for holding the next regular term. The special judge proceeded with the trial of the cause after the order of adjournment made by the duly elected judge, and the appellants seasonably objected. It is here contended that the special judge had no authority to proceed with the trial after the order of adjournment.

It is quite clear that under the provisions of the act of 1885, Elliott's Supp., section 284, the regular judge, had he been presiding, might have continued the trial beyond the

term, and under the provisions of section 415, R. S. 1881, a special judge has substantially the same power as a regular judge in so far as concerns the cause he is appointed to hear and determine. *Beitman v. Hopkins*, 109 Ind. 177; *Staser v. Hogan*, 120 Ind. 207 (224); *Wilson v. Piper*, 77 Ind. 437 (440). In *Lerch v. Emmett*, 44 Ind. 331, it was said, in speaking of a judge *pro tempore*, that he has "all the power of the regular judge."

When the regular judge yields the bench, calls in a special judge, and duly appoints him to try a designated cause, the special judge thus appointed acquires full authority over the cause throughout all of its stages, and the authority of the regular judge is necessarily excluded. In this instance the regular judge could in no wise rightfully control or interfere with the proceedings of the special judge, for the latter was the sole and exclusive judge in the cause. He did not share power with the regular judge, for the authority of that judge was effectively excluded so far as concerned the particular case, and he could make no order affecting that case. It was for the special judge to determine whether the trial should continue until the end was reached, and this was not only his right but it was his duty under the law, for it is declared by the statute that the special judge "shall have power to hear and determine said cause until the same is finally disposed of." In our opinion the particular case where there is a special judge called in, with all its incidents from the beginning to the end, passes under the exclusive control and jurisdiction of the special judge, subject to revert to the control of the regular judge in the event that the special judge becomes incapacitated or refuses to act.

We think it quite clear that under the provisions of section 10 of article 7 of the Constitution, the Legislature has the power to provide for the appointment of special judges, and to make provision for investing such special judges with the authority of regularly chosen judges in the cases enumerated. The provisions of the Constitution are very com-

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prehensive, and there can, as we conceive, be no question as to the legislative power to authorize the appointment of special judges, and to provide that their authority shall, in the cases specified, be of the same general extent and character as that of the regularly elected and qualified judge.

In this instance the special judge did not fix a term of court; he did no more than continue a trial regularly entered upon at a term fixed by law. The decision in *Batten v. State*, 80 Ind. 394, is, therefore, not relevant to the question as this record presents it.

The appellants did not object to the trial of the case by the special judge, but their objection was made against the continuance of the trial, so that the only question presented is as to the power of the special judge to continue the case beyond the time fixed for the duration of the regular term of court. We can not believe that the Legislature intended that it should be left to the pleasure of parties who enter upon a trial before a special judge to control the question of the continuance of the trial; but, on the contrary, we are satisfied that the Legislature intended that the question should be decided by the special judge, and for that purpose invested him with substantially the same power as the regular judge. It is easy to perceive what disastrous consequences might flow from a doctrine denying a special judge the power to continue a trial until a final result was reached, and we are convinced that it was not intended that such a doctrine should prevail.

A special bill of exceptions contains a part, but only a part, of the testimony of John Price, one of the witnesses called by the appellees. It appears from the bill that an interrogatory reading thus: "You may state what, in your judgment, are the actual benefits to all the lands likely to be benefited by the construction of the proposed drain." was asked the witness, and that he was permitted to answer it. As we have indicated, the evidence is not all in the record, nor does it appear whether the question was asked

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on the original examination or on the re-examination. As to these matters and as to what the cross-examination drew out, or what rulings were made during the cross-examination, the record imparts no information. In this condition of the record it can not be adjudged that it affirmatively appears that the trial court committed an error in admitting this testimony. This would be true even if it be conceded that if no evidence had been elicited by the appellants making it competent the testimony of Price would have been inadmissible. It has been often decided that a party by calling out incompetent evidence may preclude himself from successfully objecting to evidence of like character introduced by his adversary. The rule upon this subject is that evidence otherwise incompetent may be practically stripped of its objectionable character by the course pursued by the party who challenges its competency. If a party opens the door for the admission of incompetent evidence he is in no plight to complain that his adversary followed through the door thus opened. *Lowe v. Ryan*, 94 Ind. 450; *Meranda v. Spurlin*, 100 Ind. 380; *Hinton v. Whittaker*, 101 Ind. 344; *Dinwiddie v. State*, 103 Ind. 101; *Hobbs v. Board, etc.*, 116 Ind. 376; *Nitche v. Earle*, 117 Ind. 270; *Mosier v. Stoll*, 119 Ind. 244 (251). As the question comes to us we can not say that the appellants did not, on cross-examination, introduce evidence of the same character as that which they now seek to make available for a reversal of this judgment. Nor can we presume that there was nothing done making the evidence competent without a departure from settled and familiar principles. It is, and long has been, a settled rule that all reasonable intendments will be indulged in favor of the ruling of the trial court. So, too, it is well settled that a party who seeks to overthrow the judgment of a court must affirmatively show an erroneous ruling and that it was prejudicial to him. It is evident that, under these settled rules, the appellants can not successfully de-



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mand a reversal of the judgment upon the ground that there was error in admitting the testimony to which we have referred, for it does not affirmatively appear that there was error of which they can take advantage, nor is the presumption which we are bound to yield to the rulings of the trial court overthrown. We do not decide whether the evidence was or was not *per se* incompetent; we decide that the record does not show that the appellants are in a situation to successfully make any question upon its intrinsic character.

The special finding of facts, in so far as it is material and relevant to the contest here waged, is as follows:

"*First.* That the said drain will be of public utility.

"*Second.* That it will benefit several public highways in Steuben and La Grange counties.

"*Third.* That the said drainage will benefit and promote the public health."

The contention of the appellants' counsel is that the statements contained in the special finding are mere conclusions of law, and not the statements of facts. The question is presented by a motion for a *venire de novo*, and while it is true that the phrase "*venire de novo*" is not strictly an accurate one as applied to the finding of the court, yet it is a convenient term, and usage has sanctioned its employment in cases where, as here, parties desire to present objections to a special finding made by the court. Thus regarding the appellants' motion, it must be held effectual to present objections apparent upon the face of the special finding. If, therefore, such defects appear upon the face of the special finding as would lead to the condemnation of a special verdict in a like case, our judgment must be in favor of the appellants.

It is well settled that a special verdict must find the facts and state neither conclusions of law nor mere matters of evidence, and, as we have seen, what is true of a special verdict is true of a special finding. If, as appellants' counsel con-

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tend in an unusually able and vigorous argument, it be true that the special finding in this instance states only conclusions, and not facts, the motion for a *venire de novo* must prevail, and the finding go down before it. *Dixon v. Duke*, 85 Ind. 434; *Vinton v. Baldwin*, 95 Ind. 433; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186; *Indianapolis, etc., R. W. Co. v. Bush*, 101 Ind. 582; *Louisville, etc., R. W. Co. v. Balch*, 105 Ind. 93; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Conner v. Citizens St. R. W. Co.*, 105 Ind. 62; *Sohn v. Cambern*, 106 Ind. 302; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18.

It is the office of a special verdict to find the inferential facts, not mere evidentiary facts. *Locke v. Merchants Nat'l Bank*, 66 Ind. 353; *Smith v. Goodwin*, 86 Ind. 300; *Blizzard v. Riley*, 83 Ind. 300; *Bennett v. Meehan*, 83 Ind. 566; *Hagaman v. Moore*, 84 Ind. 496; *Cottrell v. Nixon*, 109 Ind. 378; *Zigler v. Menges*, 121 Ind. 99; *Seward v. Jackson*, 8 Cowen, 406; *Frombois v. Jackson*, 8 Cowen, 589; *Langley v. Warner*, 3 N. Y. 327; *State v. Watts*, 10 Iredell L. (N. C.) 369; *Blake v. Davis*, 20 Ohio, 231.

The ultimate facts must be stated, and not the evidence by which they are established. It is obvious, therefore, that the precise question here is, whether the finding states only conclusions, for it is very clear that it does not state matters of evidence. If it be faulty at all it is because it is too narrow, not because it is too broad.

In giving effect to this finding it is important to bear in mind the rule that the finding must state only the ultimate facts, for this rule restricts and limits the office of a special finding. If the court has stated the ultimate facts the finding is not ill, and the appeal must fail.

One of the most perplexing questions in the wide range of the law is whether a statement embodies a mere conclusion or contains a recital of an ultimate fact. The line between conclusions and ultimate facts is so shadowy and indistinct that it is often almost impossible to discover and follow

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it. In this instance we have concluded, after most careful study and reflection, that there are at least two inferential facts stated in the special finding before us. It seems clear that the statement that public highways in La Grange and Steuben counties will be benefited by the ditch is the statement of an ultimate fact, and not of a mere conclusion, but it is probably so vague and indefinite as to be objectionable. We conclude, upon the authorities and upon principle, that the statement that the ditch will benefit the public health is not the statement of a mere conclusion, but is the statement of an inferential fact. In *Bass v. Elliott*, 105 Ind. 517, a statement similar to that under immediate mention was treated as a fact. A similar statement was assigned a like effect in *Blizzard v. Riley*, *supra*, and that case has been often approved. *Zigler v. Menges*, *supra*. In the case of *East Saginaw, etc., R. R. Co. v. Benham*, 28 Mich. 459, it was held that a finding that "it is necessary to take the land for a public use" is sufficient.

On principle, the finding that the ditch will benefit and promote the public health is the finding of an ultimate fact and not the statement of a mere conclusion. This must be true, for no matter what else might be stated, whether the ditch would benefit the public health would be at last a matter of inference. No matter what part of the facts exhibited in the evidence might be incorporated in the special finding it could not be determined except by an inferential process what effect the opening of the ditch would have upon the public health. If a finding should be taken up for consideration in which there was no statement of the effect upon the public health, there could be no conclusion upon that question except by inference. It must, therefore, be true that in such a case as this the ultimate and inferential fact is that the ditch will benefit and promote the public health, since that fact can only be deduced by inference. In no other possible way can such a conclusion be reached.

It is settled that a witness may state that a proposed ditch

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will be conducive to the public health, and this doctrine is, in part, at least, sustained by the principle that such a statement is one of fact. *Bennett v. Meehan*, *supra*; *Yost v. Conroy*, 92 Ind. 464 (471); *Boyle v. State*, 105 Ind. 469 (472). The statement in such a case is but the statement of a conclusion from observed facts, and is, in truth, no more than the statement of the ultimate fact deduced from evidentiary facts. Each case must, in a great measure, depend upon its own characteristics and peculiarities, and in such a case as this it is not possible to do more than state the ultimate conclusion of fact, for no more can be done without violating the rule forbidding the statement of evidentiary facts, so that of necessity all that can be done is to declare the conclusion of fact. Unlike many cases there is here no standard by which it can be determined as matter of law whether a ditch will promote the public health, and that fact must, therefore, be stated as the ultimate one.

The rule we sanction is the only practicable one, for, no matter what may be stated, the court can not, unless the ultimate fact is stated, declare as matter of law that the proposed ditch would promote the public health, and the fact that it will do so must, it is evident, be stated not as matter of law, but as a matter of fact. If it can not be stated as a matter of law, then it can by no possibility be regarded as anything else than an ultimate fact, to be found and stated by the triers of the facts, and not by the judges of the law. If it does not appear on the face of the special verdict that the ditch will be conducive to the public health, then no conclusion can be drawn, since the court can look only to the verdict for the facts. This is so because there is no standard by which it can be determined as a pure matter of law that the ditch will promote the public health, and this is a marked and peculiar feature of the case, impressing upon it an unique character.

Conceding that the findings upon the question of utility and upon the question of benefit to public highways are in-

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sufficient, still, the finding upon the question of benefit to the public health is sufficient to sustain the special finding against the attack made upon it. The promotion of the public health impresses a public character upon the work, and invokes the exercise of the governmental power under which ditches may be ordered. *Zigler v. Menges, supra.* The benefit to private property resulting from the construction of the ditch authorized the special assessment which was levied upon the lands in the vicinity of the ditch.

The statute under which these proceedings were conducted does not require that a proposed ditch shall be of public utility, benefit highways and promote public health, for, if it will accomplish any one of these things, the petitioners have a right to have it established, and if its construction will specially benefit lands in the vicinity, the cost of constructing it may be assessed against the lands.

We have examined all the questions properly presented, and, finding no available error, affirm the judgment.

MITCHELL, J., took no part in the decision of this case.

Filed June 21, 1890.

No. 14,055.

MORGAN ET AL. v. KENDALL.

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**ASSAULT AND BATTERY.**—*Action for Damages.*—*Refusal of Defendants to Testify.*—*Effect of.*—*Jury.*—Where, in an action to recover damages for an alleged assault and battery, the plaintiff after testifying to the identity of the defendants, calls the defendants as witnesses for the purpose of proving who committed the assault, and they decline to answer upon the ground that their answers would tend to criminate them, such refusal is a matter proper to be considered by the jury in connection with the testimony of the plaintiff.

**SAME.**—*Allegation as to Injuries.*—*What May be Proved Under.*—In such action, under allegations in the complaint that by reason of the injuries inflicted by the defendants the plaintiff was hurt and injured and became and was sick, the plaintiff may prove the extent of his injuries, as well as the extent of his physical and mental suffering, resulting im-

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mediately from the assault and battery alleged in the complaint, and may recover for palpitation of the heart without alleging it by way of special damages.

**SAME.**—*Damages Accruing After Commencement of Suit.*—*Averment as to.*—In an action to recover damages for an assault and battery the plaintiff may recover such damages as are the natural result of his injury, without a specific averment, though such damages accrue after the commencement of the suit.

From the Clinton Circuit Court.

*T. J. Cason, W. A. Staley, J. C. Davidson and R. P. Davidson*, for appellants.

*C. S. Wesner, O. D. Wesner and R. W. Harrison*, for appellee.

**COFFEY, J.**—This was an action instituted in the Boone Circuit Court by the appellee against the appellants to recover damages for an alleged assault and battery. Upon a change of venue the cause was sent to the Clinton Circuit Court, where a trial by jury resulted in a verdict and judgment in favor of the appellee for the sum of four thousand dollars.

The complaint in the cause consists of two paragraphs. The first is in the form usually employed in actions of this kind. The second paragraph is as follows:

“And for his second paragraph of complaint herein the plaintiff says that the defendants, on the 7th day of June, 1886, at the county of Boone and State of Indiana, and about the hour of 12 o'clock at night, with force and violence took the plaintiff from his home to and into a certain field about the distance of a half mile from his home, and him the said plaintiff, the said defendants did then and there tie, fasten and lynch to a certain tree, and the said defendants did then and there strip and tear all the clothing from off the person and body of said plaintiff, and the said defendants did then and there with sticks, clubs, whips and switches beat, bruise and wound the said plaintiff on various parts of his body, by means whereof the said plaintiff was hurt and injured, and became and was sick, and the said

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defendants, at the time they so beat and bruised the plaintiff as aforesaid, then and there ordered and commanded the plaintiff at once to leave and quit his said home and the said county, and then and there informed the plaintiff, and threatened that in case he should be found at his said home twenty-four hours thereafter they, said defendants, would take his life, and the plaintiff being greatly in fear of the defendants, and believing they would execute their said threats on his failure to comply with their said demand, did leave and abandon his said home and the county. And at the time of his being so compelled to leave said county and flee from his home by reason of the threats aforesaid, he was engaged in farming and had growing a large crop of corn, and he was compelled to and did abandon said crop and has thereby lost the same, and said crop at said time was of the value of one hundred and fifty dollars; and by being so driven away, as aforesaid, the plaintiff was thrown out of employment and was compelled to and did go among strangers and was at great expense in travelling about and paying for his living, to wit, the sum of \$250; that by reason of the wrongs and injuries done him by the defendants, as in this paragraph alleged, he has been damaged in the sum of ten thousand dollars," etc.

The defendants answered by a general denial.

On the trial of the cause the appellee called each of the appellants as a witness for the purpose of proving the identity of the persons who committed the assault and battery charged in the complaint, but each of the appellants declined to answer the questions propounded to him, assigning as a reason therefor that by so doing he might subject himself to a criminal prosecution.

Upon this branch of the case the appellants requested the court, at the proper time, to instruct the jury as follows:

"17. Some of the defendants were made witnesses by the plaintiff, and declined to testify. The refusal of any one of them to testify is not a circumstance against them; it is not

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evidence against them, and can not be so used. It raises neither presumption nor implication against them or him as to being guilty of the assault complained of. This refusal can not in any way aid the plaintiff, or add to the strength of his evidence. The same force of evidence is required to find a verdict for the plaintiff with, as without, the refusal made by the defendants. In other words, it is not a matter of consideration in your minds, or of discussion in the jury room. Your duty requires you to see that your minds are not involuntarily influenced by it.

"18. The plaintiff must make out his case by proof of the affirmative fact, and the failure of the defendants to deny can not be a substitute for affirmative proof.

"19. The fact that the defendants have not testified in their own behalf, is not a circumstance that can be considered against them, or against any one not so testifying."

The court refused to give these instructions, but gave the following:

"6½. If, during the progress of the trial, any of the defendants in this action may have been called to the witness stand and declined to testify because of his privilege not to speak of the fact of the transaction, because it might subject him to a criminal prosecution, you are not to consider such refusal, or such claim of privilege from testifying, in determining the fact whether such defendant committed the act complained of against him, outside of, and independent of, this claim of privilege. The plaintiff must establish every material allegation contained in his complaint by a preponderance of the evidence given in the cause, and you will consider all other facts and circumstances present on the trial in determining what facts have been proved."

It is claimed by the appellants that the court erred in refusing the instructions asked, and, also, in giving that last above set out.

The only authorities cited by the appellants supposed to have any bearing upon the question now under consideration



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are the cases of *Long v. State*, 56 Ind. 182, *Commonwealth v. Scott*, 123 Mass. 239, and *People v. Mannausau*, 60 Mich. 15.

The case of *Long v. State*, *supra*, throws no light upon the question now under consideration, as that was a case where the counsel for the State referred in argument to the fact that the defendant in the case, which was a criminal prosecution, had not testified. It was held that by reason of the terms of our statute upon the subject the judgment should be reversed.

The case of *Commonwealth v. Scott*, *supra*, was a case where the court permitted the prosecuting attorney to comment on the fact that the defendant, in a criminal case, did not testify in his own behalf, and the judgment was reversed for that reason.

In the case of *People v. Mannausau*, *supra*, the witness, who refused to testify, was not a party to the prosecution, and it was held that his refusal to answer a question imputing to him a larceny, on the ground that his answer might subject him to criminal prosecution, was not to be considered as affecting his credibility.

None of these cases throw light upon the subject as to what effect, if any, is to be given to the refusal of a party to a civil action to answer questions when called by his adversary, upon the ground that his answers would subject him to criminal prosecution on account of the matters involved in the issues in that particular suit. It will readily be conceded that such refusal to answer could not be used against him in a criminal prosecution, for that would effectually deprive him of the benefit of the rule that a person in a criminal case can not be required to furnish proof against himself. *State v. Bailey*, 54 Iowa, 414.

The question here involved incidentally arose in the case of *Carne v. Litchfield*, 2 Mich. 340. In that case the plaintiff called the defendant as a witness, who declined to answer the question propounded to him, upon the ground that his answer thereto might tend to criminate him. During

the argument of the cause counsel for the plaintiff was commenting upon the refusal of the defendant to answer the question propounded to him when on the witness-stand, whereupon counsel for the defendant interposed an objection. The court remarked, in the hearing of the jury, that such refusal of the defendant was not evidence against him, yet it was impossible to prevent the jury from hearing the whole case and knowing what was done, in open court, in the course of the trial before them, or to prevent counsel from commenting upon it. It was held that the refusal of the defendant to testify was not evidence against him, and that the court erred in not restraining counsel in their comments upon the fact of such refusal.

This case, however, has not escaped criticism. Attached to the case, and found in the volume where the same is reported, is the following note: "The precise point involved in this opinion does not seem to have arisen in either Illinois or Wisconsin, nor in any other case in Michigan. The more it is analyzed the more doubtful it will appear. A jury have the right, and it is their duty, not merely to listen to the words which a witness utters, but to note his manner of testifying—not merely to observe how far his knowledge extends, but to note equally where his ignorance, evasion, silence, hesitation, or lapses of memory occur; thus it becomes part of his manner to note in one sense both what he testifies to and what he declines to testify to, for certainly it is equivocal logic to say that if he stammers, hesitates, evades, etc., in testifying to a given matter, the jury may note his manner, but if he refuses to testify at all they can not. In what mental condition shall they stand? Shall they try to occupy the same position as if the witness had answered the question frankly, either in the affirmative or negative? This as a rule would be impossible. It is equally impossible for them to occupy the same mental attitude as if the question had not been asked. The true position would seem to be that while the declination of the witness to answer is not to

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*Morgan et al v. Kendall.*

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be taken as an admission of his guilt, yet it is a circumstance in his manner of testifying, which, like any other physical or mental circumstance, such as delay, pallor, evasion, etc., may with other circumstances be considered by them in weighing the witnesses' testimony. Indeed no judge or jury could avoid being differently affected by the refusal to answer than they would by the answer; and if the fact be so, it would seem to be idle ceremony for the judge at *nisi prius* to order that it should not be so."

The question now before us was directly involved in the case of *Andrews v. Frye*, 104 Mass. 234. In that case the question involved was as to whether the plaintiff had a license to sell intoxicating liquor. Upon being asked that question by the defendant the plaintiff declined to answer, assigning as a reason therefor that his answer might tend to criminate himself. In commenting upon this branch of the case the court said: "This refusal to answer, like any other refusal to produce evidence in his power, was competent evidence against him and his partner. A party offering himself as a witness in his own behalf stands differently in this respect from a third person brought into court to testify in a case in which he has no interest."

We think this case states the correct rule. Suppose A. institutes suit against B. to recover the value of a horse which A. alleges B. has stolen from him. On the trial of the cause A. testifies that he saw B. take the horse from the stable, and then places B. upon the witness stand and asks him if he did not take the horse at the time and place charged. B. declines to answer, alleging and stating as a reason that his answer would tend to criminate him. Can it be denied that such conduct on the part of B. tends to corroborate the testimony of A.? So in this case, the appellee had testified to the identity of the appellants, and when placed upon the witness stand and questioned in relation to the assault and battery, with which they were charged, they declined to answer upon the ground that their answers

would tend to criminate them. We think such refusal was a matter proper to be considered by the jury, in connection with the testimony of the appellee. Nor does this holding violate the well known rule that a party in a criminal case shall not be compelled to furnish evidence against himself, for as we have seen, when prosecuted criminally, his conduct in refusing to testify in the civil case can not be given in evidence against him.

We do not think the court erred in refusing to give the instructions asked by the appellants.

The instruction given by the court was as favorable to the appellants as they had the right to ask. It is not erroneous in assuming the existence of the assault and battery charged in the complaint, as the existence of such assault and battery was not a disputed fact in the case. The controversy was over the identity of the parties who committed the wrong. In some particulars the instruction is somewhat obscure, but there is no reason to believe that the jury were misled thereby to the prejudice of the appellants.

The appellants, also, claim that the court erred in refusing to give to the jury instructions numbered three, four, five, and six, as asked by them. These instructions are as follows:

“ 3. No damages are laid in the complaint for injuries running beyond the time of commencing the action, and under the evidence in this cause none can be allowed.

“ 4. No special damages are laid in the complaint because of alleged injury to health or infirmities of any kind brought on by the alleged whipping, and there is no question of that kind before you.

“ 5. The plaintiff has testified in regard to his having palpitation of the heart, and nervous debility, brought on, as he claimed, by the alleged assault and battery; he has set out nothing of the kind in his complaint, and you are instructed to disregard any evidence upon the subject of such consequential results.

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*Morgan et al. v. Kendall.*

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"6. No special damages are laid in the complaint for the loss of time, nor is there any evidence upon that subject, and nothing of this kind can be allowed, nor for any alleged loss of crops."

The contention of the appellants is that the appellee can not recover in this action for palpitation of the heart, or for any other suffering peculiar in its nature, without alleging such peculiar suffering by way of special damages.

It is argued that the appellants are only liable for such damages as they had a right to expect as the natural consequences of their act, unless other damages are specifically alleged in the complaint; and as palpitation of the heart is not the natural or usual result of personal chastisement, the appellee can not recover on account of such suffering, in this action, because it is not specifically set forth in the complaint.

It is, no doubt, true that a party can not recover special damages without specifically alleging such damages in his complaint.

In 2 Sedgwick Damages (7 ed.), p. 607, the learned author quotes, with approval, from Mr. Chitty, the following: "Damages are either general or special. General damages are such as the law implies or presumes to have accrued from the wrong complained of. Special damages are such as really took place, and are not implied by law; and are either superadded to general damages arising from an act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damages ensuing. It does not appear to be necessary to state the former description of damages in the declaration; because presumptions of law are not, in general, to be pleaded or averred as facts. But when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is es-

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Morgan *et al.* v. Kendall.

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sential to the validity of the declaration that the resulting damages should be shown with particularity."

In a note on page 608 of the same work it is said the law presumes damages, and dispenses with their averment for bodily pain and suffering in actions for personal injury, citing *Curtis v. Rochester, etc., R. R. Co.*, 18 N. Y. 534, *Swarthout v. New Jersey Steamboat Co.*, 46 Barb. 222.

In such actions the plaintiff may also recover for mental suffering without any specific averment upon the subject. *Wright v. Compton*, 53 Ind. 337; *Ohio, etc., R. R. Co. v. Hecht*, 115 Ind. 443, and cases cited.

The complaint in this case alleges that by reason of the injuries inflicted by the appellants he was hurt and injured, and became and was sick. Under these allegations we think the appellee might prove the extent of his injuries, as well as the extent of his physical and mental suffering, resulting immediately from the assault and battery alleged in his complaint. Such physical and mental suffering was not the subject of special damages within the legal meaning of that term, and it was not necessary to specifically set them out in the complaint. For this reason the court did not err in refusing to give the fourth and fifth instructions asked by the appellants.

The third instruction asked is not the law in any aspect of the case, and should not have been given. In an action to recover damages for an assault and battery the plaintiff may recover such damages as are the natural result of his injury, without specific averment, though such damages accrue after the commencement of the suit. *Birchard v. Booth*, 4 Wis. 85.

The sixth instruction asked relates to a matter not within the issues or the evidence in the cause, and was properly refused by the court. The court instructed the jury correctly as to the measure of damages.

Finally, it is contended by the appellants that the damages assessed by the jury are excessive. We do not agree with

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Hoey v. McCarthy.

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this contention. The assault and battery charged, and proven on the trial, was of an aggravated character, and the jury who heard the evidence, and had the parties and witnesses before it, were the best judges of the amount necessary to compensate the appellee for the injuries he had received at the hands of the appellants.

There is no error in the record.

Judgment affirmed.

Filed April 25, 1890; petition for a rehearing overruled June 25, 1890.

124	464
130	286
124	464
146	371

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No. 15,541.

HOEY v. MCCARTHY.

**POOR PERSON.**—*Application to be Admitted to Prosecute.*—*Refusal.*—*Discretion of Court.*—It is only where there is a clear case of abuse of discretion on the part of the trial court in refusing an application to be admitted to prosecute an action as a poor person that its judgment will be reversed.

**SAME.**—*Non-Resident.*—*Cost Bond.*—Where such an application is denied a non-resident it is not error, upon the refusal of the plaintiff to file the bond for costs required by the statute (section 589, R. S. 1881), without any additional showing as to the claim, or inability to give the bond, to dismiss the complaint.

From the Starke Circuit Court.

*H. R. Robbins*, for appellant.

*A. J. Gould* and *J. W. Nichols*, for appellee.

**MITCHELL, J.**—The only question for decision involves the propriety of the ruling of the court in refusing to admit the appellant to prosecute an action instituted by her in the Starke Circuit Court against the appellee, as a poor person, and in sustaining a motion to dismiss the action because of the plaintiff's failure to file a bond for costs, a proper affidavit showing that she was a non-resident of the State of Indiana having been filed.

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"Any poor person, not having sufficient means to prosecute or defend an action, may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defence, who shall do their duty therein without taking any fee or reward therefor from such poor person." Section 260, R. S. 1881.

The record shows that after instituting her action, the plaintiff presented a verified petition asking the court to admit her to prosecute as a poor person. She set forth in the petition that she had a meritorious cause of action against the defendant to recover the value of seven years' services, rendered for him, and to recover \$250, money loaned defendant about four years before the action was commenced. She averred that she was poor and not worth ten dollars over and above her wearing apparel, and the claim she was prosecuting against the defendant. It does not appear that any other evidence was heard, or that any statement was made by any attorney, or other person than the petitioner, concerning the merits of the claim. Pending the plaintiff's petition, the defendant moved the court, upon an affidavit showing that the plaintiff was a non-resident of the State of Indiana, that she be required to file a bond for costs. The court denied the plaintiff's petition, and made an order requiring her within a time fixed to file a cost bond. Refusing to comply with this last order her complaint was dismissed.

An application to be permitted to prosecute an action, as a poor person, presents a subject for the sound discretion of the *nisi prius* court; and a very clear case of abuse must be shown before the discretionary power of the court can be in-



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Hoey v. McCarthy.

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terfered with. The court must be satisfied that the petitioner has not sufficient means to prosecute the action ; more than that, the court ought to be satisfied that the claim upon which the action is predicated is a meritorious one. At the common law no one was admitted to sue *in forma pauperis*. Subsequently, in pursuance of the statute, 2 Henry VII., c. 12, if the plaintiff made affidavit that he was not worth £5 above his wearing apparel he might, upon petition to the Chief Justice, supported by the opinion of counsel who had examined into the merits of his claim, be admitted to prosecute as a poor person. 1 Tidd Pr. 97. A similar practice prevails in New York, where the petitioner is required to verify his petition, and support it by the certificate of a counsellor of the court, to the effect that he has examined the claim, and is of opinion that the petitioner has a meritorious cause of action. 2 Crary N. Y. Pr. 165, 166 ; 2 Barb. Rt. of Persons, 803.

Proper caution should be observed in allowing applications like this, because it can rarely happen that any one with a good claim will be deprived of his legal right for want of a competent and reputable lawyer to vindicate his cause in the courts. *Brown v. Story*, 1 Paige, 588 ; *Isnard v. Casaux*, 1 Paige, 39.

There is probably no profession where benefactions to the poor, in the way of gratuitous services, as well as in other material respects, exceed those of the legal profession, and while an attorney can not, even upon the order of the court, be compelled to render services gratuitously (*Webb v. Baird*, 6 Ind. 13), it may be doubted whether a suitor with a meritorious cause ever failed to secure a hearing because of his inability to employ an advocate.

It is manifestly the duty of the courts to see to it that justice is not allowed to fail, and that no one is denied the opportunity of asserting his rights under the law because he is an object of charity ; but it is equally their duty not to encourage unnecessary and fruitless litigation, or to allow the

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Abbett v. The Board of Commissioners of Switzerland County.

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public treasury to be opened merely to harass persons against whom speculative claims in which no merit is apparent may be asserted. The defendant may have been unable to endure such an unequal contest.

The face of the claim in the present case is over one thousand dollars, and the court may well have believed that a competent lawyer could readily have been procured to prosecute the action if it had been believed that the claim on which it was based was a meritorious one. We can discover nothing in the record to justify an interference with the discretion exercised by the court.

The court having, for satisfactory reasons, declined to admit the appellant to prosecute as a poor person, she was subject to the provisions of section 589, R. S. 1881, which requires plaintiffs who are not residents of the State to file in the office of the clerk a written undertaking for costs.

Having refused compliance with the order of the court, without any additional showing as to her claim, or her inability to obtain a surety to sign her bond, and the order having been made in conformity with the requirements of this statute, there was no error committed in dismissing the complaint.

The judgment is affirmed, with costs.

Filed June 24, 1890.

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No. 14,350.

124	467
146	188

**ABBETT v. THE BOARD OF COMMISSIONERS OF SWITZERLAND COUNTY.**

**TAX SALE.**—*Foreclosure of Tax Lien.*—*Costs.*—*Liability of County.*—Where an action is brought in the name of the State, on the relation of the prosecuting attorney, to foreclose the lien of the State for taxes (Elliott's Supp., section 2147), and a sum sufficient is not realized from the sale of the real estate to pay the costs due the officers of the court in conse-

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Abbett v. The Board of Commissioners of Switzerland County.

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quence of the proceeding, the county in which the land is listed is not liable in its corporate capacity for the balance of such costs.

From the Switzerland Circuit Court.

*W. R. Johnston* and *F. M. Griffith*, for appellant.

*G. S. Pleasants*, for appellee.

**BERKSHIRE, C. J.**—The record presents for our consideration but a single question.

In an action brought in the name of the State, on the relation of the prosecuting attorney, to foreclose the lien of the State for taxes, as provided in section 1, p. 123, Acts of 1883 (Elliott's Supp., section 2147), in cases where a sum sufficient is not realized from the sale of the real estate to pay the costs due to the officers of the court in consequence of the proceeding, is the county wherein the land is listed liable in its corporate capacity for the balance of such costs?

In our opinion there is no such liability.

We can imagine no good reason for holding that the county is responsible for such costs. The action is brought in the name of the State, on the relation of the prosecuting attorney, who is a State officer. Nor can it be successfully maintained that the action is for the benefit of the county in its corporate capacity. The action is for the benefit of the public; not alone of the county, but of the entire State. All taxation, whether for State or county purposes, is for the support of the State government; but if this were not so, there is included in every delinquency taxes which belong in the State treasury as well as in the treasury of the county.

The lien which is foreclosed is held by the State, and not by the county; the county can not, though it might so desire, bring an action to foreclose a tax lien. It can not control the institution of the action, nor can it cause its discontinuance.

It is made the duty of the county auditor to furnish the proper list of delinquencies to the prosecuting attorney, and

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Rogers *et al.* v. Voorhees *et al.*

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it then becomes his duty in all proper cases to bring and prosecute the action.

It would hardly be contended, if the law provided that the action should be brought in the name of the State without a relator, that the county would be liable for costs, and yet we think the contention would be equally plausible with the one made, with the law as it is. The relation of the county to the action would be the same in the one case as it is in the other.

We find no error in the record.

Judgment affirmed, with costs.

Filed June 24, 1890.

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No. 15,503.

ROGERS ET AL. v. VOORHEES ET AL.

**DRAINAGE.—Inadequacy of Original Assessment.—Reassessment of Benefits.—**

In case the original assessment of benefits made in a drainage proceeding, instituted under the act of April 6th, 1885, proves inadequate to complete the work, it is competent for the court, upon due petition and notice, to refer the matter to the commissioners of drainage, or if they be for any reason incompetent to act, to new commissioners, for the purpose of reassessing benefits, in order to complete the work, or pay the deficit in case the work has been completed.

From the Vigo Circuit Court.

*U. J. Hammond, E. S. G. Rogers and B. V. Marshall*, for appellants.

*W. W. Rumsey*, for appellees.

**MITCHELL, C. J.**—The only question involved in this appeal is whether or not in case the original assessment of benefits made in a drainage proceeding instituted under the act of April 6th, 1885, proves inadequate to complete the work, it is competent for the court, upon due petition and

124	469
130	518
124	469
132	29
124	469
137	388
124	469
152	324
124	469
154	108

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*Rogers et al. v. Voorhees et al.*

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notice, to refer the matter to the commissioners of drainage, or if they be for any reason incompetent to act, to new commissioners for the purpose of reassessing benefits, in order to complete the work, or pay the deficit in case the work has been completed. The act concerning the drainage of wet lands makes two propositions clear beyond doubt or dispute: 1. That the lands benefited must bear the entire burden of the costs, damages and expenses of effecting the drainage, and 2. That no land can be assessed for an amount in excess of the benefits which actually accrue to it. Whenever it is made to appear that the costs, damages and expenses of effecting the drainage exceed the benefits to be derived therefrom it is the duty of the court to suspend further proceedings.

The drainage of the land can not be deemed fully accomplished, nor the proceeding ended, until the drain has been completed according to the plans and specifications on file, and the expenses of constructing the work, and the costs and damages necessarily incident thereto have been paid, and until the commissioner having charge of the work has made his final report, and an order discharging him has been made by the court. Until this is done the proceeding remains under the control of the court. *Steele v. Hanna*, 117 Ind. 333. An attentive reading of the act referred to, keeping in view the scope and purpose of the statute, and that it is to be liberally construed so as to promote the end for which it was enacted, makes it manifest that while the proceeding remains under its control the court has large discretion in respect to modifying, equalizing and changing assessments. It is a reasonable supposition that the Legislature must have anticipated that expenses and deficits arising from floods, mistakes, accidents, litigation and other causes that could not be foreseen at the time the work was entered upon must necessarily be provided for, or the work fail of completion in many instances. Hence the provision authorizing any person interested to file a supplemental petition in certain

cases, and authorizing the court to release any person from liability or modify his assessment, as provided in Elliott's Supp., section 1191. See, also, section 1188.

The power of the court, until the work is fully completed and accepted, must be regarded as a continuing power within the limits above stated, viz., that the entire cost of the improvement must fall upon the lands benefited in proportion to the benefits which accrue to each tract effected, and that no tract can be assessed in a sum exceeding the amount of benefits resulting to it from the work, as adjudged by the court. What good reason can be suggested for holding that if on account of a supervening flood the cost of completing the work should be greatly increased, the court might not ascertain upon a supplemental petition and notice whether or not the benefits to the lands might not be equal to the expense of constructing the work notwithstanding the enhanced cost. If, as in the present case, the cost or expense of completing the work is enhanced by expensive litigation, so that the amount expended must either be lost or an additional assessment made, in case the benefit to be derived will, in the judgment of the court, admit of it, we see no reason why a liberal construction of the statute will not authorize it to be done. The case is fully within the rules laid down and elaborated in *Board, etc., v. Fullen*, 111 Ind. 410, and cases following it, and upon the principles enunciated in that case the judgment is affirmed, with costs.

Filed May 17, 1890; petition for a rehearing overruled June 25, 1890.

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Wilson *et al.* v. Wilson *et al.*

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124 472  
188 125

No. 14,344.

## WILSON ET AL. v. WILSON ET AL.

**QUIETING TITLE.—Pleading.**—In an action to quiet title, a general allegation that the defendants assert an unfounded title is sufficient to show that a claim of title is asserted by them.

From the Dearborn Circuit Court.

*N. S. Givan* and *J. K. Thompson*, for appellants.

*J. B. Coles*, for appellees.

**ELLIOTT, J.**—The complaint of the appellees seeks a decree quieting title to real estate, and the single objection urged by the appellants against it, is that it does not sufficiently show that a claim of title is asserted by them. This contention can not prevail. There is a general allegation that the defendants assert an unfounded title, and this allegation is sufficient. *Otis v. De Boer*, 116 Ind. 531; *Johnson v. Taylor*, 106 Ind. 89; *Rausch v. Trustees, etc.*, 107 Ind. 1; *Conger v. Miller*, 104 Ind. 592; *Woodworth v. Zimmerman*, 92 Ind. 349; *Marot v. Germania, etc., Ass'n*, 54 Ind. 37.

We have no doubt that under our system of procedure an owner of land is entitled to have his title freed from any and all claims asserted against it. He has a right to remove from his title any claims that may embarrass the sale of his land or interfere with its enjoyment. Our court has adopted the rule sanctioned by Mr. Pomeroy, and under that rule unfounded claims which cloud the title, no matter what their character or what the manner of their assertion, may be removed by a decree quieting the title. *Bishop v. Moorman*, 98 Ind. 1 (49 Am. Rep. 731); *Otis v. Gregory*, 111 Ind. 504; *Scobey v. Walker*, 114 Ind. 254; *Fitzmaurice v. Mosier*, 116 Ind. 363 (367).

This is the just and reasonable rule, for there is neither propriety nor justice in permitting a defendant to wrongfully assert title to the property, and yet deny the owner a right

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The Pennsylvania Company v. Mitchell.

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to settle the question of title because the assertion is not made in a particular mode.

The judgment is clearly right upon the merits, and is affirmed.

Filed June 24, 1890.

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No 14,108.

THE PENNSYLVANIA COMPANY v. MITCHELL.

**RAILROAD.**—*Injury to Animals where Company is not Required to Fence.*—*Non-Liability.*—A railroad company is not liable for injuries to animals that enter upon its track at places where to maintain fences would interfere with the discharge of its duty to the public, or with the rights of the public in the use of the highway, or in doing business with the company, nor at any place where fences and connecting cattle-guards would make the running and handling of trains, or the necessary and proper switching of cars, more hazardous to its employees. Where animals enter upon railroad grounds at such places and are killed within limits that can not be and are not required to be fenced, the company is not liable.

**SAME.**—Railroad companies can not be required to erect and maintain fences along uninclosed and unimproved lands, nor in the platted portions of cities, towns and villages, but they are, nevertheless, liable for injury to animals that enter upon their tracks at such places, in case the track was not, but might have been, securely fenced without interfering with the discharge of its duty to the public, or without increasing the danger to its employees in the discharge of their duties.

**SAME.**—*Maintenance of Cattle-Guards.*—*Opinion Evidence.*—*Inadmissibility of.*—It was not error to exclude the evidence of a witness whose opinion was asked as to whether or not a cattle-guard could have been maintained at a particular place without increasing the danger to the defendant's trainmen. That was a conclusion for the jury to draw from all the evidence in the case.

From the Morgan Circuit Court.

*S. O. Pickens*, for appellant.

*J. V. Mitchell* and *J. F. Cox*, for appellee.

**MITCHELL, J.**—The appellant railroad company was sued



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The Pennsylvania Company v. Mitchell.

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by the appellee for the value of two mules alleged to have been killed on the company's railroad track by its locomotive and cars.

The case was tried upon a complaint which charged that the track was not securely fenced at the point where the animals entered.

The chief question debated here is whether the railroad company was required to fence its track at the place where the animals entered upon its right of way.

It is abundantly settled that a railroad company is not liable for injuries to animals that enter upon its track at places where to maintain fences would interfere with the discharge of its duty to the public, or with the rights of the public in the use of the highway, or in doing business with the company, nor at any place where fences and connecting cattle-guards would make the running and handling of trains, or the necessary and proper switching of cars, more hazardous to its employees. When animals enter upon railroad grounds at such places and are killed within limits that can not and are not required to be fenced, the company is not liable. *Cincinnati, etc., R. R. Co. v. Jones*, 111 Ind. 259, and cases cited. Railroad companies can not be required to erect and maintain fences along uninclosed and unimproved lands, nor in the platted portions of cities, towns and villages, but they are, nevertheless, liable for injury to animals that enter upon their tracks at such places, in case the track was not, but might have been, securely fenced without interfering with the discharge of its duty to the public, or without increasing the danger to its employees in the discharge of their duties. These are conceded propositions about which there is no dispute. It is conceded that the tracks were not fenced at the place where the animals entered, nor where they were killed. The contention is as to the liability of the company notwithstanding the absence of the fence, the insistence on the one hand being, that a fence and connecting cattle-pits could not have been maintained without subjecting the train-

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The Pennsylvania Company v. Mitchell.

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men of the company to additional perils; while it is contended on the other hand that the evidence fairly sustains the opposite conclusion.

We concede that the utmost liberality should be extended to railroad companies where fences and cattle-guards are dispensed with out of considerations of safety for trainmen or employees, or for the safety, convenience or welfare of the public. The judgment and discretion of officers and agents should not be coerced so as to put human life or limb in jeopardy in order to avoid pecuniary liability for animals killed. Notwithstanding this, after an attentive consideration of the evidence and arguments in the present case, we find ourselves unable to disturb the verdict of the jury. While a different conclusion might well have been arrived at, it can not be said that the verdict of the jury is without any support in the evidence. Admitting the truth of all that is testified to by the appellant's witnesses, the jury may have found from evidence in the record that a fence and suitable cattle-guards might have been maintained without peril to the appellant's employees at a point where they would have had no occasion to cross it in switching cars or making up trains. There was no error in excluding the evidence of the witness whose opinion was asked as to whether or not a cattle-guard could have been maintained at a particular place without increasing the danger to the appellant's trainmen. *Indiana, etc., R. W. Co. v. Hale*, 93 Ind. 79; *Chicago, etc., R. W. Co. v. Modesitt, ante*, p. 212. That was a conclusion for the jury to draw from all the evidence in the case. Without first giving the facts upon which to base an opinion, it was not competent for a witness, even though he had long experience in railroading, to state whether or not a fence and cattle-guards could or could not be maintained at a given place with safety to the employees of the railroad.

The judgment is affirmed, with costs.

Filed June 25, 1890.

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*Turpie et al. v. Fagg, Constable.*

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No. 13,929.

**TURPIE ET AL. v. FAGG, CONSTABLE.**

**REPLEVIN.**—*Complaint.*—*Sufficiency of.*— Under section 1266, R. S. 1881, authorizing actions of replevin for possession of personal property, a complaint which alleges that the plaintiffs are the owners of the property, and entitled to the possession, and that the defendant has possession without right, and unlawfully detains the same from the owner, is sufficient to entitle the plaintiffs to maintain an action for possession.

**SAME.**—*Title.*—The complaint is sufficient to try the title to the property without the averment required by section 1267, R. S. 1881, that the property was not seized under an execution, or, if so seized, that it was exempt.

From the White Circuit Court.

*A. W. Reynolds and E. B. Sellers, for appellants.*

*R. P. Davidson and J. C. Davidson, for appellee.*

**OLDS, J.**—This was an action in replevin, by James H. and William Turpie, against John W. Fagg, constable of Monon township, White county, Indiana. The appellee demurred to the complaint, for cause, that the complaint did not state sufficient facts to constitute a cause of action. The court sustained the demurrer, and appellants refusing to plead further the court rendered judgment, on demurrer, for the appellee, and from this judgment appellants prosecute this appeal, and assign as error the ruling of the court in sustaining the demurrer.

The statute (section 1266, R. S. 1881,) authorizing actions of replevin for possession of personal property reads as follows :

“ When any personal goods are wrongfully taken, or unlawfully detained, from the owner or person claiming the possession thereof, or, when taken on execution or attachment, are claimed by any person other than the defendant, the owner or claimant may bring an action for the possession thereof.”

This section provides that a suit may be maintained for

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the possession of personal property in any of the following cases:

*First.* When any personal goods are wrongfully taken and detained from the owner or person claiming the possession.

*Second.* When any personal goods are unlawfully detained from the owner or person claiming possession thereof, though they may have been lawfully taken in the first instance.

*Third.* When goods are taken on execution or attachment, and are claimed by some person other than the defendant.

It is alleged in the complaint that "the plaintiffs are the owners, and are entitled to the possession, of one black horse of the value of one hundred dollars, which the defendant has possession of without right, and unlawfully detains from the plaintiffs."

These allegations are sufficient to entitle the plaintiffs to maintain the action for the possession. It alleges ownership in the plaintiffs, and that the defendant has possession of the property without right, and unlawfully detains the same from the owner. It remains, then, to determine whether the further allegations render it invalid. It is further alleged that "the same has not been taken for any tax assessment or fine pursuant to any statute, nor seized under any attachment against the property of the plaintiffs, but it is seized under an execution issued on a judgment, which judgment has been paid, and was paid before said execution was issued."

Section 1267 provides that if the plaintiff in an action for possession of personal property claim the immediate possession of such property, he, or some one in his behalf, must make an affidavit showing certain facts.

In this case the complaint and affidavit are one, which is proper practice. *Minchrod v. Windoes*, 29 Ind. 288. The only objection made to the sufficiency of the complaint or affidavit is that it omits to aver, as provided in section 1267, *supra*, it shall be stated, that the property has not been seized under an execution against the property of the plaintiff, or

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*Stoft et al. v. Herrell et al.*

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if so seized, that it is exempt from such seizure. In lieu of this averment it alleges that the property was seized under an execution issued on a judgment, which judgment had been paid, and was paid before the execution issued.

The complaint would be good to try the title to the property without any of the averments of fact as required by section 1267, *supra*.

It is not necessary to determine whether the facts stated were sufficient to entitle the plaintiff to writ of replevin. If there had been a motion to quash the writ then this question would arise; or if the allegations showed whom the judgment and execution were against, then a different question would be presented.

The court erred in sustaining the demurrer to the complaint.

Judgment reversed, at costs of appellee.

Filed Nov. 19, 1889; petition for a rehearing overruled June 25, 1890.

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No. 14,408.

STOFT ET AL. v. HERRELL ET AL.

SUPREME COURT.—*Weight of Evidence*.—Where there is legal evidence in the record tending to support the verdict of the jury or the finding of the court on every material point, the Supreme Court will not disturb the verdict or finding on the weight of the evidence.

From the Vanderburgh Circuit Court.

*W. M. Blakey* and *R. C. Wilkinson*, for appellants.

*C. Staser*, *A. Gilchrist* and *C. A. De Bruler*, for appellees.

COFFEY, J.—This was a proceeding instituted by the appellees before the board of commissioners of Vanderburgh county, to vacate a certain described portion of a public highway located in said county. Upon the filing of a re-

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port by the viewers appointed to view said highway the appellants filed a remonstrance. Thereupon the board of commissioners appointed reviewers, two of whom reported in favor of said proposed vacation.

Upon this report an order was entered vacating the portion of the highway described in the petition, from which an appeal was taken to the Vanderburgh Circuit Court.

In that court the cause was tried by a jury, resulting in a verdict for the appellees, upon which the court, over a motion for a new trial, rendered judgment vacating the highway as prayed in the petition.

The error assigned here calls in question the correctness of the ruling of the circuit court in overruling the motion for a new trial.

The reasons assigned for a new trial were :

*First.* That the verdict of the jury was not supported by sufficient evidence.

*Second.* That the verdict was contrary to law.

We have carefully read the evidence, and, while a greater number of witnesses testified on behalf of the appellants than on behalf of the appellees, we find much conflict. This court will reverse a cause on the evidence where it does not support the verdict of the jury or the finding of the court ; but it will not undertake to weigh conflicting evidence with a view of ascertaining with which party the preponderance rests. *Gagg v. Vetter*, 41 Ind. 228 ; *Fort Wayne, etc., R. R. Co. v. Husselman*, 65 Ind. 73.

If there is legal evidence in the record which tends to support the verdict of the jury, or the finding of the court, on every material point, this court will not disturb the verdict or finding on the weight of the evidence. *Schofield v. Henderson*, 67 Ind. 258 ; *Swales v. Southard*, 64 Ind. 557.

The only question presented by the record before us, is the one involving the weight of the evidence.

Judgment affirmed.

Filed June 25, 1890.

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 Balue v. Richardson.
 

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No. 14,353.

**BALUE v. RICHARDSON.**

**PRACTICE.**—*Motions to Strike Out Pleadings.*—*Bill of Exceptions.*—Motions to strike out pleadings and to separate and number paragraphs of pleading, and the rulings thereon, must be brought into the record by a proper bill of exceptions or be made a part of the record by order of the court.

From the Vigo Superior Court.

*N. G. Buff* and *T. W. Harper*, for appellant.

*G. W. Faris*, *S. R. Hamill*, *D. N. Taylor*, *N. Morris*, *L. Newberger* and *J. B. Curtis*, for appellee.

**OLDS, J.**—This is an action by the appellee against the appellant. The complaint is in four paragraphs. The first alleges the sale of certain real estate by appellee to appellant for \$3,000, and that as a part of the consideration appellant assumed and agreed to pay certain encumbrances on the property, and that there is due and unpaid \$800 of the purchase-money.

The second alleges the same facts, and that appellant failed and refused to pay certain of the encumbrances, and that appellant agreed to pay \$196.90 interest and taxes, and \$23 for abstracts of said property, and that there is still due and unpaid the sum of \$238.20 of the purchase-money.

The third paragraph is for \$42 damages sustained by reason of a contract relating to the sale of goods.

The fourth paragraph is for \$5 for the one-half interest in a map.

Appellant answered the complaint. The plaintiff then filed a supplemental complaint, alleging that since the commencement of the action plaintiff, the appellee, had paid \$546.39 of the liens and encumbrances on said real estate, the payment of which had been assumed by the appellant as part of the consideration of said real estate, as alleged in the original complaint.

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124 490  
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The appellant then moved the court to strike out the supplemental complaint, which motion was overruled. The appellant then moved the court to require the appellee to separately state and number his causes of action set out in his supplemental complaint, or, as it is stated in the record, "to paragraph his supplemental complaint," which motion was overruled, and the appellant then filed his motion to tax all costs prior to the filing of the supplemental complaint to the plaintiff, which motion was also overruled.

The appellant excepted to the rulings of the court on the two first motions at the time.

The rulings of the court on these various motions are assigned as error, and are the only errors assigned.

There is no bill of exceptions presenting these various rulings, nor are the motions and rulings thereon made a part of the record; they seem to have been oral motions, and stated no reasons for the motions. Motions to strike out pleadings and to separate and number paragraphs of pleadings, and the rulings thereon, must be brought into the record by a proper bill of exceptions or be made a part of the record by order of the court. *Manhattan Life Ins. Co. v. Doll*, 80 Ind. 113.

There is no question presented by the record for the decision of this court.

Judgment affirmed, with costs.

Filed June 25, 1890.

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No. 13,402.

## THE CITY OF COLUMBUS v. STRASSNER.

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167	521
124	482
171	701

**MUNICIPAL CORPORATION.—Defective Sidewalk.—Duty of City to Keep in Repair.—Complaint.**—In an action against a city for damages for injuries caused by a defective sidewalk, an allegation that the city had exclusive authority and jurisdiction over its streets, alleys and sidewalks, and negligently permitted one of its sidewalks—the one on the west side of Washington street—to get out of repair, is sufficient to show that the sidewalk where the injury is alleged to have occurred was within the city and under its jurisdiction.

**SAME.—Complaint Negating Contributory Negligence.—Sufficiency of.**—Where the complaint alleges that the injury occurred without the fault of the plaintiff it will be sustained, unless it clearly appears from the facts specifically stated that there was negligence on the part of the plaintiff which contributed to the injury.

**SAME.—Contributory Negligence.**—Where the question of contributory negligence is a controverted one, it is a question of fact for the jury, and their verdict will not be disturbed if there is evidence to support it.

**SAME.—Injury Caused by Defective Sidewalk.—Extent of.—Evidence.—Cross-Examination.**—The question “I will ask you if you didn’t go to Mrs. Williams, your sister-in-law’s, and if you didn’t strike her daughter over the head with a crutch and knock her down on the floor,” was a proper question to be asked on cross-examination as tending to contradict the plaintiff’s evidence in chief, and to show the plaintiff’s injury was not so great as claimed. The defendant was not required to make the proof by its own witnesses, but had the right to elicit the testimony from the plaintiff.

**SAME.—Knowledge of Defective Sidewalk.—Right of Action.**—Where one suffers an injury occasioned by a defective sidewalk, the mere fact that before the accident happened he knew of such defect does not deprive him of his right of action. The fact that he had knowledge of the defect, with all the other facts bearing on the question, is to be considered by the jury in determining whether he was guilty of contributory negligence.

**SAME.—Notice to Councilman.—Instruction to Jury.**—It was not error to instruct the jury that notice to a councilman of a defective sidewalk was notice to the city.

**SAME.—Measure of Damages.—“Lack of Personal Enjoyment.”**—An instruction to the jury that they should consider in measuring the damages any “lack of personal enjoyment” occasioned by the injury, was erroneous.

From the Decatur Circuit Court.

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The City of Columbus v. Strassner.

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*S. Stansifer, C. S. Baker and G. W. Cooper, for appellant.  
J. D. Miller, F. E. Gavin and J. C. Orr, for appellee.*

BERKSHIRE, C. J.—This is an action instituted by the appellee against the appellant for damages.

The complaint contains two paragraphs. To each paragraph a demurrer was filed.

The court overruled the demurrers, and exceptions were reserved.

An answer in general denial was filed by the appellant. The cause was submitted to a jury, who returned a verdict for the appellee, and over a motion for a new trial judgment was rendered in accordance with the verdict of the jury.

The errors assigned are as follows :

1. The court erred in overruling the demurrer to the first paragraph of the complaint.
2. The court erred in overruling the demurrer to the second paragraph of the complaint.
3. The court erred in overruling the motion for a new trial.

The only objection made to the first paragraph of the complaint is that it fails to show that the sidewalk complained of was one which it was the duty, or right, of the appellant to keep in repair.

The same objection is made to the second paragraph, and an additional objection that the facts alleged in the second paragraph disclose contributory negligence. We do not think either objection is well taken.

The following allegations as to the location of the sidewalk complained of appear in the first paragraph of the complaint :

“The plaintiff, Mattie Strassner, complaining of the defendant, the city of Columbus, Indiana, says that said defendant is a municipal corporation ; that as such corporation it has exclusive authority and jurisdiction over its streets, alleys, and sidewalks ; that it is its, the said defendant’s, duty

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to maintain the same in good and safe repair; that regardless of this, its said duty, the defendant, about four months prior to the 9th day of May, 1884, negligently permitted *one of its said sidewalks, to wit*, the one on the west side of Washington street, in front of building No. 334, a store-room occupied by John F. Snyder, to get out of repair, and become dangerous to the life of pedestrians."

No greater strictness is required in pleading under our liberal practice than certainty to a common intent; the pleading in question comes up to this standard. It is alleged that the appellant had exclusive authority and jurisdiction over its streets, alleys and sidewalks, and negligently permitted one of its said sidewalks, to wit, the one on the west side of Washington street to get out of repair, etc. This sufficiently shows, without further particularity, that the sidewalk where the injury is alleged to have occurred was within the city and under its jurisdiction. The averment is still stronger in the second paragraph, for in addition to what is alleged in the first paragraph, it alleges that the city had had control of said sidewalk for many years. See *Tice v. City of Bay City*, 44 N.W. Rep. (Mich.) 52; *Ivory v. Town of Deer Park*, 116 N. Y. 476. But the language of the paragraphs of the pleading in question is so similar to that found in the complaint in the case of *City of Lafayette v. Larson*, 73 Ind. 367, that we are inclined to the opinion that the one was copied from the other. We do not think that the second paragraph of the complaint, on its face, imputes contributory negligence to the appellee, and as it does not the question was left as a question of fact for the jury, and is not open to the objection urged against it.

In *City of Elkhart v. Witman*, 122 Ind. 538, this court said: "It is asserted by counsel that the complaint is bad because it does not show that the plaintiff was not guilty of contributory negligence, but in our opinion counsel are clearly in error. The direct averment is made that she was injured without fault or negligence on her part, and this, as

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has been many times decided, is sufficient to show that she was not guilty of contributory negligence. \* \* Where the complaint alleges that the injury occurred without the fault of the plaintiff it will be sustained, unless it clearly appears, from the facts specifically stated, that there was negligence on his part which contributed to the injury. There are no facts from which it can be inferred, in the face of the direct averment that there was no fault on the part of the plaintiff, that she was guilty of contributory negligence. It does not appear that she knew of the unsafe condition of the sidewalk, but if she did, it would not be conclusive against her; for, although knowledge of a defect is evidence of an important character tending to show contributory negligence, it does not of itself establish that fact." That case seems to be decisive of the question here under consideration.

We think that, notwithstanding the facts pleaded, there may have been want of contributory negligence, and as the paragraphs expressly aver that the appellee was not guilty of contributory negligence, the pleading is not ill because of the second objection urged against it.

This brings us to the third assigned error.

We are not willing to hold that the uncontradicted evidence introduced on the trial disclosed contributory negligence on the part of the appellee, and this we would have to do if we were to decide that the verdict of the jury was not supported by sufficient evidence.

Conceding that the appellant in its brief has correctly and fully copied the testimony of the appellee relating to the question of contributory negligence (and this it has done, substantially if not literally), when all of the evidence in the case is considered we are not able to say as a matter of law that the appellee was guilty of contributory negligence.

The question of contributory negligence, as a question of evidence, was a controverted question, and therefore a ques-

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tion purely of fact for the determination of the jury. See *Jung v. City of Stevens Point*, 43 N. W. Rep. (Wis.) 513.

In *Holloway v. City of Lockport*, 61 N. Y. Sup. Ct. 153, the court said: "The duty of the defendant was to keep the streets, and sidewalks, constructed under its orders and directions within the city limits, in a reasonably safe and secure condition. If the plaintiff did, in fact, know of the real condition of the walk before the accident happened, that circumstance alone does not deprive him of a right of action. That circumstance, however, with all the other facts bearing on the question, was to be considered and weighed by the jury in determining whether the plaintiff was guilty of contributory negligence. We think that the jury properly disposed of that question; at least the case, as presented by all the evidence, is such as not to permit us to disturb their finding on the question."

The foregoing expresses the true rule as we understand it, and is in accord with our own cases. See *Town of Gosport v. Evans*, 112 Ind. 133; *City of Fort Wayne v. Breese*, 123 Ind. 581.

In *City of Chicago v. McLean*, 24 N. E. (Ill.) 527, the court said: "Appellant also assigns as error the refusal of the court to give the fourth and sixth instructions asked by it. In the fourth it was stated that 'a person in the full possession of her faculties, passing over a sidewalk when there was light, with no crowd to jostle or disturb her, and no intervening object to hide a dangerous place which she is approaching, and no sudden cause to distract her attention, is bound to use her eyes to direct her footsteps; and if she failed so to do, and is negligent therein, she had no cause of action against the city for injuries received by her because she stepped without looking into such dangerous place.' In the sixth it was said that 'ordinary care requires that the foot-passenger shall use her eyes as well as her feet, and therefore, if you believe from the evidence that the plaintiff was injured because of the failure on her part to look where she was going or

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observe the condition of the sidewalk on which she was walking, you should find the defendant not guilty.' These instructions were properly refused. They virtually tell the jury that certain facts constitute negligence. Negligence is a question of fact, and not one of law, and 'it is for the jury to determine from the evidence whether one or both of the parties may have been negligent in their conduct, and not for the court to take the question from them, and declare if certain facts exist negligence is established.'"

If we are to understand from the reasoning and conclusion in the foregoing case, that a person passing along a street or sidewalk in a city is not bound to reasonable care and to the employment of his sense of sight, to that extent we must refuse our assent, but in other respects we regard it as an authority. *City of Elkhart v. Witman, supra*.

In *Pettengill v. City of Yonkers*, 71 N. Y. 558, it is said, "A person using a public street has no reason to apprehend danger, and is not required to be vigilant to discover dangerous obstructions, but he may walk or drive in the day-time or night-time, relying upon the assumption that the corporation whose duty it is to keep the streets in a safe condition for travel have performed that duty, and that he is exposed to no danger from its neglect." See *Dundas v. City of Lansing*, 75 Mich. 499.

The conclusion to which we have arrived is not inconsistent with the reasoning and conclusions reached in *Town of Gosport v. Evans, supra*, nor with *City of Plymouth v. Milner*, 117 Ind. 324. Those cases belong to a different class, and are fully adhered to.

The evidence sufficiently shows that the sidewalk and street were in the corporate limits of the city, and hence were under its control. See *Ivory v. Town of Deer Park, supra*; *Town of Gosport v. Evans, supra*; section 3161, R. S. 1881.

The question propounded to the appellee as to the number of brothers she had, and the proposed testimony to follow, were not competent on cross-examination, but if they had been

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the whole matter to which the question and offer related came out when the appellant introduced its evidence in chief, and therefore the appellant was not injured by the court's ruling.

We are of the opinion that the question, "I will ask you if you didn't go to Mrs. Williams, your sister-in-law's, and if you didn't strike her daughter over the head with a crutch and knock her down on the floor," in view of what the appellee had testified to in her examination in chief, and the offer which was made, was a proper question to be asked on cross-examination, and that the court erred in excluding the testimony.

It was an important question as to how seriously, if at all, the appellee had been injured, and whether or not she had the use of her limbs; the proposed testimony would not only have had a tendency to contradict the plaintiff's evidence in chief, but to show that her injury was not nearly so great as she claimed; and the appellant was not bound to make the proof by witnesses whom it might introduce, but had the right to elicit the testimony from the appellee.

Such proof coming from the appellee, the opposite party, might have been much more influential than if it had come from one of the appellant's witnesses, and, as we have said, would have necessarily weakened the appellee's testimony in chief.

We have carefully examined the instructions given by the learned judge who presided at the trial, on his own motion, and those requested by the appellant, those refused, as well as those given, and are of the opinion that the instructions given covered, clearly and succinctly, the law of the case; and that the court committed no error in the refusal to give the instructions requested, nor in giving its own instructions, except in the giving of instruction numbered twenty-one.

So far as the appellant's instructions which were refused, were proper, they were covered by the instructions that were by the court.

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It is urged that the instructions given by the court, on its own motion, that referred to the question of notice to the appellant that the sidewalk was out of repair, omitted the word "reasonable," but the jury were not misled thereby, for the reason that the court, in a special instruction upon that subject asked by the appellant, informed the jury that the notice referred to in the instructions was a reasonable notice. It was proper to instruct the jury that notice to a councilman was notice to the city. *City of Logansport v. Justice*, 74 Ind. 378; *City of Lafayette v. Larson*, *supra*.

Instruction numbered twenty-one was erroneous, in that it informed the jury that they should take into consideration in measuring the damages which they would assess, in case they found for the appellee, any "lack of personal enjoyment" occasioned by the injury. In other respects we are satisfied with the instruction, but in the respect mentioned we are of the opinion that it is erroneous. Counsel for the appellee have cited us to no authority in support of the instruction, and we have found none. The question of damages, like other legal propositions, should rest upon some substantial basis. The following inquiries, therefore, suggest themselves: What is "personal enjoyment"? How are we to ascertain to what extent it is possessed by a human being? How can its absence and the cause thereof be demonstrated? If a person for any cause has been deprived of "personal enjoyment" how are we to go about adjusting his loss upon a money basis? These questions seem to be pertinent, but unanswerable, and suggest an insuperable difficulty to the measurement of damages because of loss of "personal enjoyment." We are unable to say to what extent the objectionable part of the said instruction influenced the jury in measuring the damages which were assessed against the appellant, and, therefore, can not hold that it was not injured by the instruction.



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Because of the errors indicated, the judgment must be reversed.

Judgment reversed, with costs.

Filed June 25, 1890.

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No. 14,158.

BAKER ET AL. v. THE GERMAN FIRE INSURANCE COMPANY.

**INSURANCE.—Proof of Loss.—Requirement in Policy as to.—Duty of Assured.**  
—The requirement in a policy of insurance that particular proof of loss shall be made under oath as soon as possible, imposes upon the insured the duty of making such proof within a reasonable time and without unnecessary delay.

**SAME.—Time of Making Proof.—Question of Law.**—Where there is no dispute as to the facts whether the requirements of the policy as to time of making proof have been complied with, is a question of law for the court.

**SAME.—Delay.—Non-Compliance with Conditions of Policy.**—An unexplained delay of three months and nineteen days after the fire, in making the particular proof of loss, is unreasonable, and is not a compliance with the conditions of the policy.

**SAME.—Complaint.—Conditions Precedent.**—In a complaint to recover upon a policy of fire insurance, it must affirmatively appear that all conditions precedent to a right of recovery have been complied with by the insured, or an excuse for non-performance or a waiver of such conditions must appear, in order that the complaint may be held sufficient.

**SAME.—Occupancy of Building.—Warranty.**—A statement inserted in the face of the policy that the building insured is "occupied as a hotel, with bar and billiard-room attached," constitutes an express warranty that the building is so occupied at the time the policy is issued, and the fact that it was not so occupied at the time the policy was issued, but was occupied instead by a saloon, constitutes a defence to an action on the policy.

From the Marion Superior Court.

F. Winter and R. Hill, for appellants.

V. Carter, F. M. Finch and J. A. Finch, for appellee.

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MITCHELL, J.—The policy of insurance upon which this action was predicated contained a stipulation to the effect that in case of damage by fire the assured should forthwith give notice to the company, and as soon thereafter as possible render a particular account of the loss under oath.

It was averred in the first paragraph of the complaint that the plaintiffs had performed all the terms and conditions of the policy to be performed by them on their part. It also appeared by the averments of the same paragraph that the loss occurred on the 24th day of August, 1884, and that the particular proof thereof, as required by the policy, was not furnished until December 12th, 1884, a period of three months and nineteen days after the fire.

From the well established principle that specific allegations of fact, in a pleading, control general averments, it must follow that the general averment that the plaintiffs had performed all the terms and conditions of the policy to be performed by them, must be construed in connection with the specific allegations contained in the complaint upon the subject of proof of loss.

The requirement that particular proof of loss should be made under oath as soon as possible, imposed upon the insured the duty of making such proof within a reasonable time and without unnecessary delay. *Provident L. Ins. Co. v. Baum*, 29 Ind. 236; *Railway, etc., Co. v. Burwell*, 44 Ind. 460; *Wood Fire Ins.*, section 414. Where there is no dispute as to the facts, whether the requirements of the policy as to time have been complied with, is a question of law for the court. *Insurance Co., etc., v. Brim*, 111 Ind. 281; *Wood Fire Ins.*, section 412.

An unexplained delay, such as is shown by the complaint to have occurred in the present case, is unreasonable, and is not a compliance with the condition of the policy. *Trask v. State, etc., Ins. Co.*, 29 Pa. St. 198; *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621; *Mellen v. Hamilton F. Ins. Co.*, 17 N. Y. 609.

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In a complaint to recover upon a policy of fire insurance, it must affirmatively appear that all conditions precedent to a right of recovery have been complied with by the insured, or an excuse for non-performance, or a waiver of such conditions must appear, in order that the complaint may be held sufficient. The court committed no error in sustaining the demurrer to the first paragraph of the complaint.

The ruling of the court in holding the facts averred in the second paragraph of answer sufficient to constitute a defence is complained of. It was stated in the written part of the policy, exhibited with the complaint, that the building insured was "occupied as a hotel, with bar and billiard room attached," and the policy contained a printed stipulation to the effect, that any false representation or concealment concerning the use or occupation of the property should avoid the contract. It was averred in the answer that the assured represented that the building, mentioned in the policy, was used as a hotel at the time the contract was made, and that particular inquiry was made of the assured in respect to certain newspaper reports of disreputable dances and gatherings theretofore permitted in the vicinity of the building, and that the plaintiff represented that the dances and gatherings referred to had not been held in the building to which the insurance under negotiation applied. It is then averred that the building was not used as a hotel at the time the policy was issued, but that it was used by one Selking as a saloon, and that the disreputable dances and gatherings, referred to in the newspaper reports, particularly inquired of, were had in the building insured.

The statement that the building insured was "occupied as a hotel, with bar and billiard-room attached," inserted in the face of the policy, constituted an express warranty that the building was so occupied at the time the policy was issued, and the validity of the contract depended upon the truth of the stipulation. *Commonwealth's Ins. Co. v. Monninger*, 18 Ind. 352; *Wall v. East River Mut. Ins. Co.*, 7

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N. Y. 370; *Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464; *Goddard v. Monitor, etc., Ins. Co.*, 108 Mass. 56 (11 Am. Rep. 307); *Texas Banking, etc., Co. v. Stone*, 49 Texas, 4.

The phrase "occupied," etc., related to the character of the risk at the time the contract was made, and was in the nature of a condition precedent to the taking effect of the policy. If it was not so occupied, then the minds of the parties never met upon the subject-matter of the contract, and the policy did not attach in the absence of any showing that the company or its agent had knowledge of the real occupancy of the property. *Insurance Co. v. Pyle*, 44 Ohio St. 19; *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220; 1 Wood Fire Ins., section 178.

Stipulations relating to the occupancy of the property, inserted in the face of the policy, are regarded as warranties concerning its occupancy and use at the time the contract is entered into. Unless the language employed clearly indicates that the stipulation is intended to constitute a continuing or promissory warranty; it will be confined to the occupancy of the property at the time of the inception of the contract. The policy having once attached, it will not be avoided on account of a change of occupancy unless the property is afterwards devoted to a use expressly forbidden or to one which increases the hazard in a material degree. *Blumer v. Phoenix Ins. Co.*, 48 Wis. 535 (33 Am. Rep. 830, and note); 11 Am. and Eng. Encyc. of Law, 290.

The facts stated constitute a sufficient answer without regard to the alleged misrepresentations made by the assured.

It follows from what has been said above that the court committed no error in instructing the jury that the stipulation above referred to written in the policy constituted a warranty that the building was occupied as a hotel, with bar and billiard-room attached, and for no other purpose, at the time the policy was issued. In our opinion *Hall v. People's Mut. Ins. Co.*, 6 Gray, 185, is not opposed to this conclusion.

The conclusion having been reached that the stipulation

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inserted on the face of the policy, in relation to the occupancy of the building, constituted a warranty, it follows, in case it was not occupied as therein represented, that the contract of insurance never became effectual because the minds of the parties did not meet, and this would be equally so whether the insured did or did not know whether the occupancy of the property was different from that stated in the policy.

Other instructions relating to representations made by the plaintiff in respect to the disreputable uses permitted in the building were given. We do not regard that feature of the case as very material. The trial seems to have proceeded upon the theory that the second paragraph of answer presented two separate and independent defences, one resting upon a breach of the warranty contained in the policy in respect to the occupancy of the building; the other upon the ground that false representations had been made by the assured in relation to a matter particularly inquired about, material to the character of the risk. Both parties having tacitly treated the answer as presenting distinct defences, the instructions of the court, and its rulings in admitting evidence in support of that feature of the answer which related to false representations constituted no error of which the appellant can complain. The defence growing out of the breach of warranty was complete, and if the court imposed upon the insurance company the burden of making the additional defence, predicated upon false representations, the appellant was not injured.

We have considered all the questions presented and find no reversible error.

The judgment is affirmed, with costs.

Filed June 26, 1890.

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The White Sewing Machine Company v. Gordon.

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No. 14,364.

## THE WHITE SEWING MACHINE COMPANY v. GORDON.

**EVIDENCE.**—*Testimony by Comparison of Signature.*—*Non-Expert Witnesses.*—

*Cross-Examination.*—Where the genuineness of a signature to a bond in suit is in dispute, papers not in evidence in the cause nor admitted to be genuine can not be used for making comparisons between the signatures thereto and the signature whose genuineness is disputed, and it is not error to refuse to allow the plaintiff to cross-examine the defendant's witnesses, who are not experts, and who have not referred to the papers in their direct examination, with reference to the genuineness of the signatures to such papers.

**SAME.**—*Microscopic Enlargement of Signature.*—*Inadmissibility of.*—It is not error to refuse to submit to the jury for inspection a microscopic enlargement of a disputed signature, where the original is in court and where it is not proposed to compare it with enlarged copies of signatures admitted to be genuine.

**SAME.**—*Jury.*—*Incompetency of Testimony.*—A witness, shown to be acquainted with another's handwriting, may refer to the papers in his possession known to be in the writing of another, for the purpose of refreshing his memory before testifying, but such papers, the signatures to which not having been admitted to be genuine, are not competent testimony to go to the jury.

From the Steuben Circuit Court.

*M. B. Johnson, W. G. Cruxton and F. M. Powers*, for appellant.

*D. R. Best and E. A. Bratton*, for appellee.

**COFFEY, J.**—This was a suit by the appellant against the appellee upon a bond which the complaint alleges was executed to the appellant, by the appellee, as surety of one Bush Gordon.

The appellee pleaded *non est factum*. The cause was tried by a jury, resulting in a verdict for the appellee, upon which the court rendered judgment.

The error assigned is, that the court erred in overruling the motion for a new trial.

It is claimed by the appellant that the court erred in refusing to permit it to prove by Asa T. Beebe, and others, witnesses called by the appellee, on cross-examination, that

124	495
142	70
124	495
144	637

124	495
170	213

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The White Sewing Machine Company v. Gordon.

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in their opinion the signatures to two letters, four promissory notes, and a certain claim-file, were the genuine signatures of the appellee. The two letters, a witness called by the appellant testified he had received from the appellee, and that they, among other things, had given him his acquaintance with the appellee's handwriting, and that from his acquaintance with the appellee's handwriting he believed the signature to the bond in suit was genuine.

The four promissory notes were produced by a witness on behalf of the appellant, who testified that he was acquainted with the appellee's signature; that one of the means by which he became acquainted with it was by seeing it to said notes, and that in his opinion the signature to the bond in suit was the appellee's genuine signature.

The claim-file was identified by a witness for the appellant, who testified that the same was acknowledged before him, and that he was acquainted with the handwriting of the appellee, and that, in his opinion, the signature to the bond in suit was his genuine signature.

The letters, promissory notes and claim-file were not papers in this cause, nor were the signatures thereto admitted to be the genuine signatures of the appellee, nor were they read in evidence. They could not under these circumstances be used for making comparison between the signatures thereto attached and the signatures to the bond in suit. *Burdick v. Hunt*, 43 Ind. 381; *Huston v. Schindler*, 46 Ind. 38; *Jones v. State*, 60 Ind. 241. Furthermore, these papers had not been referred to by the witnesses sought to be cross-examined, and were not in any way connected with their testimony, they were not expert witnesses. For these reasons the testimony sought to be elicited was not cross-examination. The court did not, under the circumstances, err in sustaining an objection thereto.

The extent to which a cross-examination shall be conducted is largely in the discretion of the trial court, and such discretion will not be interfered with unless it clearly ap-

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The White Sewing Machine Company v. Gordon.

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pears that such discretion has been abused to the injury of the party complaining. For this reason we can not say that the court erred in refusing to allow the appellant to prove by the appellee on cross-examination that the signatures to the notes and letters above referred to were genuine.

On the trial of the cause the appellant offered, for the inspection of the jury, what purported to be a microscopic enlargement of the signature of the appellee to the bond in suit, and proved by a competent witness that he made it by hand from an image in the camera-lucida. Upon objection made by the appellee, the appellant, by his counsel, stated to the court that he expected to prove by said witness that it was a microscopic enlargement, and a correct enlargement of the signature upon the bond, and that said enlargement showed that after the letter "o" in the word "Gordon" had been made, the pen was put aside to retouch it; but the court sustained the objection and excluded the enlarged microscopic signature. The witness, however, was permitted to testify fully in relation to said signature, and to its appearance in its enlarged condition.

It is claimed by the appellant that the court erred in excluding from the inspection of the jury the enlarged microscopic signature.

In the case of *Marcy v. Barnes*, 16 Gray, 161, it was held that it was not improper to permit the jury to compare magnified photographic copies of genuine signatures with similar copies of the disputed signature, but in this case it was not proposed to compare the enlarged copy of the disputed signature with a similar one of a signature admitted to be genuine. The offer was to furnish such enlarged copy merely for the inspection of the jury.

It seems to be well established that photographs are not admissible in evidence when the original can be produced in court, photographs at best being secondary evidence. *Rogers Expert Testimony*, section 144; *Matter of Foster's Will*, 34



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The White Sewing Machine Company v. Gordon.

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Mich. 23; *Eborn v. Zumpelman*, 47 Texas, 503; *Niller v. Johnson*, 27 Md. 6; *Tome v. Parkersburg, etc., R. R. Co.*, 39 Md. 36.

The enlarged signature offered to the jury in this case was, at most, a mere copy, while the original was in court. Had it been desirable that the jury should examine the signature in question with the aid of a microscope, we know of no reason why they should not have been permitted to do so; but the admission of what purported to be an enlarged copy of such signature opened the door to innumerable collateral questions. We do not think the court erred in refusing to submit to the inspection of the jury this enlarged copy of the signature in question, as it was not proposed to compare it with enlarged copies of signatures admitted to be genuine.

It is also claimed by the appellant that the circuit court erred in refusing to admit in evidence the letters and promissory notes herein before referred to in this opinion. In the exclusion of these letters and notes we do not think the court erred. The witnesses having them in possession had the right to refer to them for the purpose of refreshing their memories before testifying, and in corroboration of their testimony, addressed to the court, upon the subject of their competency to testify, but they were not competent testimony to go to the jury. *Thomas v. State*, 103 Ind. 419.

They had no connection whatever with the case on trial. As the signatures thereto were not admitted to be genuine, they could not, as we have seen, be compared with the signature to the bond in suit. There was no issue in the case upon which they could have thrown any light.

Finally, it is contended by the appellant that the verdict of the jury is not supported by the evidence in the cause.

The appellee testified on the trial of the cause that he did not sign or execute the bond in suit. There is much testimony in the cause tending to corroborate him. The record presents a case where there is a conflict in the evidence upon all the material points in the case. It has been so often de-

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McBride v. Hicklin.

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cided, and is so well settled, that this court will not undertake to weigh conflicting evidence, that we need cite no authority upon the subject.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed June 26, 1890.

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No. 14,372.

MCBRIDE v. HICKLIN.

*ANIMALS.—Impounding of by Supervisor.—Compensation for Care and Feed.—*

A supervisor who takes up and impounds sheep which have escaped from the enclosure of the owner, can not recover for feeding and caring for them, where the owner immediately makes diligent search for them. Such animals can not be considered as running at large within the meaning of the statute (section 2637, R. S. 1881, *et seq.*).

From the Vigo Circuit Court.

*N. G. Buff* and *P. M. Foley*, for appellant.

*W. J. Whitaker* and *T. W. Harper*, for appellee.

ELLIOTT, J.—The appellant, acting in his official capacity of supervisor, took up and impounded thirty-eight sheep belonging to the appellee, and he brought this action to recover for feeding and caring for them. The second paragraph of the answer alleges that the animals escaped from the enclosure of the appellee late in the night, and that early the next morning he hunted for and found them.

Conceding, but not deciding, that a supervisor who takes up animals found running at large, may recover the compensation provided by the statute (sections 2637, 2643, R. S. 1881,) in a personal action against the owner, the answer is nevertheless good, for the statute does not apply to cases where the animals escaped from the enclosure of the owner,

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Clutter v. Riddle *et al.*

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and he at once makes diligent search for them. *Jones v. Clouser*, 114 Ind. 387; *Rutter v. Henry*, 20 N. E. Rep. (Ohio), 334.

All that it is proper for us to decide, and all that we do decide, is that animals which escape from their owner's enclosure can not be considered as running at large, within the meaning of the statute, in a case where, as here, the owner makes diligent efforts to recover them.

The appellant did recover some damages below, and, as there is no specification in the motion for a new trial, challenging the amount of recovery, no question is presented for our consideration. *Davis v. Montgomery*, 123 Ind. 587.

Judgment affirmed.

Filed June 26, 1890.

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No. 14,351.

CLUTTER v. RIDDLE ET AL.

**BILL OF EXCEPTIONS.**—For bill of exceptions containing the evidence held to be properly in the record, see opinion.

**SUPREME COURT.**—*Weight of Evidence.*—Where there is evidence tending to support the finding of the court, the Supreme Court will not reverse a judgment on the weight of the evidence.

From the Vigo Superior Court.

*B. E. Rhoads* and *E. F. Williams*, for appellant.

*S. B. Davis*, for appellees.

**BERKSHIRE, C. J.**—This action rests upon a promissory note and an account to which is joined a proceeding in attachment.

We find some confusion in the record, but we think that final judgment was rendered in the main action, and in the ancillary proceeding also, on the 10th day of May, 1887. The appellant on the same day filed separate motions for a new trial, one in the main action and the other in the

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 Guirl *et al.* v. Gillett.
 

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proceeding in attachment. On the 9th day of June following, the said motions were overruled, and the proper exceptions reserved, and sixty days time granted in which to file a bill of exceptions. The bill of exceptions was filed within the time given, in which was properly embodied the long-hand report of the evidence furnished by the official reporter.

Our conclusion, therefore, is that the motion to dismiss the appeal should be overruled.

Upon the merits of the case the record presents but one question: Is there sufficient evidence to support the court's finding in the ancillary proceeding?

The ground of attachment alleged in the affidavit is non-residence. We have carefully canvassed the evidence but feel that no good purpose would be subserved by stating the course of our deliberations in this opinion. The evidence relied upon by the appellee as it appears in the record, is not altogether clear and satisfactory, but we are not prepared to hold that it is not sufficient to sustain the finding of the court, and hence, as we have many times decided, we can not disturb the finding, though the evidence carries with it an impress of weakness.

The judgment is affirmed, with costs.

Filed June 26, 1890.

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 No. 14,298.

GUIRL ET AL. v. GILLETT.

**BILL OF EXCEPTIONS.**—*Filing with Clerk.—Failure of Record to Show.*—

Where it appears from the memorandum of the judge upon the bill of exceptions that the bill was presented to him and signed two days after the transcript had been certified to the Supreme Court by the clerk, and there is nothing in the record or upon the bill showing that it was ever filed with the clerk, no question is presented on the evidence.

From the Clinton Circuit Court.

124	501
134	7
135	583
121	501
139	571
124	501
140	348
142	226
142	264
142	679
143	210
143	366
143	418
134	501
146	217
147	512
147	515
124	501
149	583
124	501
156	104
124	501
170	644

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Guirl *et al.* v. Gillett.

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*C. W. Griffin, M. Bristow and M. B. Beard*, for appellants.

*A. C. Ayres, E. A. Brown, L. M. Brown, J. Q. Bayless and S. O. Bayless*, for appellee.

MITCHELL, J.—This was an action by Gillett against William H. Guirl, and two others, partners, doing business under the firm name of W. H. Guirl & Co., to recover the contract price of a turning-lathe sold and delivered by the plaintiff to the defendants.

The plaintiff had a verdict and judgment in the court below. A document purporting to be the long-hand manuscript of the evidence, with a certificate of the official stenographer attached, is certified with the record. This paper has the formal caption of a bill of exceptions, and concludes with the usual statement: "This was all the evidence given in the case." The certificate of the official stenographer is no proper part of a bill of exceptions, and neither adds to nor detracts from its effect. There is no formal conclusion to the bill, but below the certificate, signed by the stenographer, is a memorandum signed by the judge, as follows: "Presented and signed March 14th, 1888." This was within the time limited, and might possibly be held a sufficient compliance with section 629, R. S. 1881, which requires that the date of the presentation shall be stated in the bill of exceptions, but there is nothing anywhere in the record to show that the bill was ever filed with the clerk. Indeed, it is certain, if the dates are correctly stated, that it never was filed with the clerk after it was presented to the presiding judge. The clerk certified the record to this court on the 12th day of March, 1888, and the memorandum of the judge shows that the bill of exceptions was presented to him and signed on the 14th day of March, 1888, two days after the transcript had been certified here. A bill of exceptions only becomes a part of the record after it has been duly presented to the presiding judge, and has been signed and filed by him. The bill itself can not show when it was filed. This must appear

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Trentman *et al.* v. Neff *et al.*


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by the record, independent of the bill. *Fulkerson v. Armstrong*, 39 Ind. 472; 2 Works Pr., p. 99. In the present case there is nothing either in the record or upon or about the bill to afford a hint or suggestion that it was ever filed with the clerk. This condition of the record was pointed out by the appellees in a brief filed more than a year ago, and the point was insisted upon that none of the questions discussed were presented for decision. If it had been thought of sufficient importance the record might have been corrected by application to the court below, so as to have caused it to show the filing of the bill with the clerk. *Rigler v. Rigler*, 120 Ind. 431. As this has not been done, it only remains for the court to apply a long settled rule and hold, since it does not appear that a proper bill of exceptions containing the evidence was filed, that the record presents none of the questions discussed for decision.

The judgment is therefore affirmed, with costs.

Filed June 20, 1890; petition for a rehearing overruled Sept. 16, 1890.

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No. 14,070.

TRENTMAN ET AL. v. NEFF ET AL.

124	503
147	690

**REAL ESTATE.—Deed.—Description.**—Real estate was conveyed by the following description: "One-eighth of the undivided one hundred and forty-one and one-half acres of land, known as the 'Old John Whiteneck farm,' in Waltz township, Wabash county, State of Indiana, to wit: Reserve No. 4, section 31, township 26 north, of range 7 and 6." *Held*, that the description was not void for uncertainty, it appearing from the evidence that the grantor owned an undivided one-eighth interest in one hundred and forty-one and one half acres of land in said reserve, and that the one hundred and forty-one and one-half acres was known as the "Old John Whiteneck farm."

124	503
164	582

**PLEADING.—Must Proceed on Particular Theory.**—A pleading must rest upon some particular theory, and be sufficient upon that theory.

From the Wabash Circuit Court.

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*Trentman et al. v. Neff et al.*

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*C. N. Stephenson, A. Taylor, M. H. Kidd and N. G. Hunter*, for appellants.

BERKSHIRE, C. J.—This action was commenced by the appellants, other than John H. Whiteneck, by the filing of a creditor's bill against the appellees, the said John H. Whiteneck and others. The said John H. Whiteneck filed a cross-complaint alleging the same facts substantially that are charged in the complaint.

Issue having been joined on the complaint and cross-complaint, the cause was submitted to the court for trial, and after the evidence had been introduced and argument of counsel heard, the court made its finding for the appellees.

The appellants, other than the said John H. Whiteneck, filed their motion for a new trial, and he filed a like motion, which motion the court overruled, and the proper exceptions were taken, and the court rendered judgment for the appellees, from which judgment this appeal is taken.

The only specifications in the assignment of error urged in the briefs of counsel representing the appellants are those which call in question the rulings of the court in overruling the said motions for a new trial. The motions for a new trial state but two reasons therefor: 1. The finding of the court is not sustained by sufficient evidence. 2. Its finding is contrary to law.

Counsel for the appellants confine their argument to the first stated cause.

We are without the benefit of a brief from the appellee; this is hardly excusable in a case of so much importance. Having succeeded in the court below the appellees should have felt sufficient interest in maintaining its judgment as not to have placed this court at the disadvantage of passing upon the questions involved without an argument in their behalf.

In considering the question involved we must keep in mind the nature of the action and the relief demanded.

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*Trentman et al. v. Neff et al.*

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The appellants were judgment creditors of the appellee William G. Whiteneck; Millie Whiteneck, another of the appellees, was his wife; the said William was the owner of and held the legal title to certain real estate; he and his wife executed a conveyance by the following description to one Benjamin F. Ellis for said real estate: "One-eighth of the undivided one hundred and forty-one and one-half acres of land, known as the 'Old John Whiteneck farm,' in Waltz township, Wabash county, State of Indiana, to wit: Reserve No. 4, section 31, township 26 north, of range 7 and 6."

Ellis executed a conveyance to the said Millie Whiteneck at the same time for the said real estate by a like description.

Afterwards the said William and Millie conveyed the said real estate to the appellee Mary A. Neff by a description which is conceded to be amply sufficient; at the time the first two conveyances were executed the appellants had not obtained their judgments, but had obtained them before the execution of the last of said conveyances.

It has been often held by this court that whatever the character of the pleading it must rest upon some particular theory, and must be sufficient upon that theory.

As we understand the complaint in this action, it proceeds upon the theory that the real estate of which the said William G. Whiteneck was the owner, was conveyed in fraud of creditors, and hence we in the beginning referred to it as a creditor's bill.

It is true it gives the description of the land as set forth in the deeds from the said William and Millie Whiteneck to the said Benjamin F. Ellis, and from him to the said Millie, and avers that because of the uncertainty therein the said conveyances were ineffectual to convey title; but when the pleading is considered as an entirety it is evident that it was drafted upon the theory that Mrs. Neff was not a good-faith purchaser, and that she held the real estate subject to the judgments of the appellants, and upon this theory the cross-complaint was drafted. Resting upon this theory the com-



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*Trentman et al. v. Neff et al.*

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plaint states a good cause of action, but not upon any other theory, as will hereafter appear.

After giving a careful consideration to the evidence as we find it in the record, we are led to the conclusion that there was abundant evidence for the court to rest its conclusion upon that Mrs. Neff was a good-faith purchaser for a valuable consideration, even if it be conceded that the conveyances to Ellis and to Mrs. Whiteneck were tainted with fraud.

But suppose it be conceded that the complaint counts on the alleged uncertainty of description found in the deeds to Ellis, and to Mrs. Whiteneck, and waiving all questions as to whether or not the deed of William and Millie to Mrs. Neff, by a good description, and for a valuable consideration, would cure the infirmity, it is our opinion that the complaint is bad. In the first place, if the legal title was in William Whiteneck, as it would have been if the said conveyances were void for uncertainty in the description given of the real estate as contended, the appellants' plain and simple remedy was to take out an execution and levy upon the land, and not by an appeal to a court of equity.

But it is not our opinion that the description in the said conveyances contained is void for uncertainty.

It already appears in this opinion, and it is not necessary to give it again.

We think there was sufficient in the description, aided as it might be by parol evidence, to convey an undivided one-eighth interest located in the section, town, and range therein given.

It appears from the evidence that the said William S. Whiteneck, when he and his wife conveyed to Ellis, owned an undivided one-eighth interest in 141½ acres of land situated in the reserve and section named, and that he owned no interest in any other tract containing the same number of acres, or approaching near to that number; it appears, also, from the evidence that John Whiteneck, the father of the

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Tobin *et al.* v. Young.

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said William, died seized of the  $141\frac{1}{2}$  acres of land in which the said William held said undivided interest, and that the same, except  $4\frac{1}{2}$  acres which she thereafter purchased, was set off in a partition proceeding to Lucy, the widow of John, and the mother of William, and that William held said undivided interest therein by inheritance from his said mother; and it further appears in evidence that the said  $141\frac{1}{2}$  acres was known as the "Old John Whiteneck farm"—as the old home place; John H. Whiteneck, one of the appellants, so testifies; and it so appears from the description, as given in the complaint, which all parties concede is an accurate description.

The two descriptions are substantially the same, except that the description in the deed to Ellis and to Mrs. Whiteneck does not give the metes and bounds.

We find no error in the record.

Judgment affirmed, with costs.

Filed June 7, 1890; petition for a rehearing overruled Sept. 17 1890.

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No. 13,339.

### TOBIN ET AL. v. YOUNG.

**LANDLORD AND TENANT.**—*Denial of Landlord's Title.*—*Termination of Tenancy.*—*Notice to Quit.*—Where the tenant denies the landlord's title and asserts ownership, such a repudiation of the tenure terminates the tenancy, and a notice to quit is unnecessary.

**EVIDENCE.**—*Conversation Between Third Person in Absence of Party.*—*Inadmissibility.*—Evidence of a conversation between third persons in the absence of a party, is not admissible against the latter.

**SAME.**—*Exclusion of.*—Where questions are not asked a witness, there is no available error in excluding offered testimony.

**SAME.**—*Self-Serving Declarations.*—Written statements made by a third person through whom a party claims, are inadmissible against the opposite

124	507
133	189
124	507
140	579
124	507
147	540
124	507
164	276

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Tobin *et al.* v. Young.

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party, if made without his knowledge. Self-serving declarations are not competent as a general rule.

**SAME.**—*Effect of Admissions.*—*Instruction.*—It is not error to refuse to instruct the jury as to what effect shall be given to admissions of a party.

From the Montgomery Circuit Court.

*T. E. Ballard, E. E. Ballard, M. E. Clodfelter, M. D. White and E. V. Brookshire*, for appellants.

*A. D. Thomas, J. F. Harney, W. H. Thompson, J. West and E. C. Snyder*, for appellee.

ELLIOTT, J.—The controversy in this case is as to the ownership and right of possession of one hundred acres of land; the appellants claim title through Lafayette Young, deceased, and the appellee claims that he is the owner and that Lafayette Young was his tenant.

It is established by our decisions that where there is a conflict in the evidence this court will not attempt to determine on which side the weight is, but will accept as proof of the facts the evidence which the jury and the trial court acted upon, and will apply the law to the facts thus established. It is only where there is no legitimate evidence sustaining the conclusions of fact reached in the trial court that this court will disturb a finding or verdict. *Julian v. Western Union Tel. Co.*, 98 Ind. 327; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20 (28).

Accepting, as we must, the evidence which produced conviction in the minds of the jury, these material facts must be deemed to have been established: Lafayette Young, through whom the appellants claim, was the son of the appellee, and the appellants are his widow and children. For some time Lafayette Young and his family resided with the appellee not far from the land in controversy; but, in April, 1872, they resolved to seek and find a home for themselves. They made known their resolution to the appellee and after they had looked at some farms in the vicinity a proposal was made that they should occupy the land in dispute. This

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*Tobin et al. v. Young.*

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proposal, however, was not made until after they had made some negotiations looking to the purchase of a tract of land called the "Stypes farm." To aid them in buying that farm the father of the wife of Lafayette Young offered to advance one thousand dollars, but the appellee objected to the purchase of the "Stypes farm," and suggested that his son should take the land now claimed by the appellants. For many years that land had been owned by the appellee. Lafayette Young went into possession and was living on the land at the time of his death, in April, 1883. During the time he occupied the land he made valuable and permanent improvements, and exercised acts indicating to outward appearance an ownership of the land. He was in possession for eleven years prior to his death, and his widow, with her young children, continued in possession for about two years after he died. Thus far the evidence is not conflicting in any material particular, but it is expressly conceded by appellants' counsel that upon the question of the contract under which Lafayette Young went into possession there is a direct and irreconcilable conflict. There is much evidence tending to prove that he went into possession as a tenant and not as a purchaser. What occurred after his death is thus stated by the appellee in his testimony. Speaking of a conversation he had with his son's widow, he said: "She asked me what terms I was going to give her. I don't know that I can give the exact language, but, at any rate, it was a question to know what I was going to do with her now that Lafayette was gone. I told her for the present I was going to give her and the children just the same advantages that Lefe had heretofore had. She insisted on having terms for a term of years. I told her no; I did not want to do that. We would try it for a year, at the end of a year we would be governed by circumstances." The widow when called as a witness denied that she ever had any conversation with the appellee upon the subject of the terms and conditions on which she should continue in possession of the farm. The

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*Tobin et al. v. Young.*

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theory of the appellants, as asserted in various modes, was that Lafayette Young held the land as a purchaser and not as a tenant. Acts were shown by the appellants in support of their claim as owners, but no evidence was given by them for the purpose of establishing the relation of landlord and tenant; on the contrary, their theory was that Lafayette Young held as a purchaser and not as a tenant. Their purpose was to make good their theory that the appellee did not own the land and that his son did own it, and the constant effort of counsel was to accomplish this purpose.

The appellants may, of course, avail themselves of evidence showing either the weakness of the appellee's title or the strength of their own, no matter from what source it may come. All defences are open to them except such as they have by their own acts concluded themselves from making. If they did not hold in the capacity of owners, but did, in fact, hold as tenants, they may avail themselves of their rights as tenants unless they have concluded themselves from asserting a defence founded upon their rights as tenants of the appellee. We assume, under the rule we have stated, that they were in possession as tenants, for this is the theory upon which the trial court proceeded, and it is that which all the evidence introduced by the appellee tended to establish. The question, in so far as it is affected by the evidence that the relation of landlord and tenant existed, is narrowed to this, have the appellants placed themselves in a position which disables them from successfully asserting that the appellee can not recover, for the reason that the tenancy had not expired and no notice to quit had been given?

The acts of the appellants in denying the title of the appellee, and in asserting that their ancestor held possession as owner, preclude them from successfully asserting any rights as tenants. The principle which rules this case was thus stated by the Supreme Court of the United States: "It is an undoubted principle of law, fully recognized by this court, that a tenant can not dispute the title of his landlord, either

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Tobin *et al.* v. Young.

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by setting up a title in himself, or a third person, during the existence of the lease or tenancy." The consequences of a violation of this well settled rule are thus stated by the same court: "If the tenant disclaim the tenure, claim the fee adversely, in right of a third person, or his own, or attorn to another, his possession then becomes a tortious one, by the forfeiture of his right. The landlord's right of entry is complete, and he may sue at any time within the period of limitation." *Willison v. Watkins*, 3 Peters, 43. In the case of *Sims v. Cooper*, 106 Ind. 87, the question was before us for decision, and we held that where the tenant denied the landlord's title, and asserted ownership, such a repudiation of the tenure terminated the tenancy, and dispensed with a notice to quit. This holding is fully sustained by the adjudged cases and by the text-writers. 1 Wood Landlord and Tenant, 123; 1 Taylor Landlord and Tenant, section 472; Sedgwick and Wait Trial of Title to Land, section 387.

The decisions, indeed, go to the extent of holding that the denial of the landlord's title makes the tenant a trespasser. *Jackson v. Wheeler*, 6 Johns. 272; *Vincent v. Corbin*, 85 N. C. 108; *Meraman v. Caldwell*, 8 B. Mon. 32; *Stephens v. Brown*, 56 Mo. 23; *Fuller v. Sweet*, 30 Mich. 237.

The appellants' counsel refer us to a class of cases represented by *Whiting v. Edmunds*, 94 N. Y. 309, and affirm that the court, in the class of cases it represents, declared the rule to be different from that asserted in the authorities to which we have referred, but in this they are in error. What is decided in the case referred to is that a tenant can not deny his landlord's title, retain possession, and set the statute of limitations to running. The general doctrine we have stated is fully recognized, and the court, among other things, said: "But to do so effectively, and initiate an adverse holding, the tenant must surrender the possession to the landlord, or do something equivalent to that, and bring home to him knowledge of the adverse claim." It is perfectly clear that the question in such a case as this is entirely dif-

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ferent from that which arises where the tenant seeks to defeat the landlord by claiming to hold adversely after having acquired possession under the landlord. The suggestion of the distinction is sufficient without elaboration.

It is not too much to say that no doctrine can be found in the text-books or the decisions which supports the contention that a tenant may deny the landlord's title and yet defeat an action upon the ground that the landlord has not done all that he was bound to do. The old adage that "A man can not blow both hot and cold," precludes a tenant from asserting that he has rights as tenant, while denying that the relation of landlord and tenant exists. The doctrine expressed by the adage has found expression and illustration in the numerous cases which hold that a party will not be permitted to occupy inconsistent positions.

In commenting on the case of *Sharpe v. Kelly*, 5 Denio, 431, which, by the way, is directly against them, counsel for the appellants say: "The case holds that a party may acquire title consistent with that admitted by his entry as tenant. The appellants in this case claimed nothing more, they only asserted that appellee's title passed to them by contract." It is somewhat difficult to conceive how more could be claimed than that the appellee had parted with his title to the appellants' ancestor; at all events, the claim is such as to preclude the appellants from asserting a tenancy in order to defeat the landlord or to compel him to do what he would have been required to do had they not disavowed his title and asserted title in themselves. By the assertion of title they informed the appellee that notice to quit would be unavailing, and thus by their own act relieved him from the duty of giving it. One of the elementary rules of law is that if a party to a contract repudiates it he relieves the other from giving notice or making a demand. *Vinton v. Baldwin*, 95 Ind. 433; *Willcuts v. Northwestern M. L. Ins. Co.*, 81 Ind. 300; *Turner v. Parry*, 27 Ind. 163; *Hanna v. Phelps*, 7 Ind. 21.

We have discussed the questions presented by the appel-

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lants' argument, that their rights as tenants enable them to defeat the appellee, at more length than we need have done in view of the fact that the law is so well settled, but we have done so because of the earnestness of appellants' counsel, and the industry shown in the preparation of their brief. What we have said fully disposes of all the questions which arise in this branch of the case.

The questions which arise on the issue made by the appellants' assertion of title are presented by the ruling denying a new trial, and relate chiefly to rulings in admitting and in excluding evidence.

There was no error in excluding the testimony of Brookshire and Stypes as to a conversation which occurred concerning the purchase of a farm by Lafayette Young from the latter. The appellee could not be injuriously affected by a conversation not heard by him between third persons.

Other points made upon the rulings on the evidence may be disposed of by the application of the rule laid down in the case of *Higham v. Vanosdol*, 101 Ind. 160. That rule is this: Where questions are not asked a witness, there is no available error in excluding offered testimony.

The appellants called a witness to identify a policy of insurance which had been issued to Lafayette Young, and the appellee was permitted to ask on cross-examination what was said by Young at the time the policy was taken out. It is by no means certain that the questions were not proper on cross-examination, but we need not decide whether they were or not, for, conceding that they were not proper, still no error sufficient to warrant a reversal was committed. The appellee was entitled to prove the declarations of Lafayette Young, and the utmost that can be said is that it was not strictly proper to allow them to be brought out on cross-examination.

There was no error in excluding written statements of Lafayette Young of which the appellee had no knowledge.



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Self-serving declarations are not competent as a general rule.

The court did right in admitting in evidence the written contract between the appellee and Henry Herman. The evidence warrants the inference that Lafayette Young knew of the contract, and as he did know of it, the fact tended to support the appellee's case, for the contract and the acts done under it were unequivocal assertions of title.

If it were conceded that it was error to admit in evidence the cross-complaint filed by some of the appellants, but which was afterwards withdrawn, still, the error, if it was one, could by no possibility have injured the appellants, since it was an assertion of the title they sought to maintain. But we are inclined to the opinion that the cross-complaint was properly admitted, and that it would have been error to exclude it. *Boots v. Canine*, 94 Ind. 408, and authorities cited; *Baltimore, etc., R. W. Co. v. Evarts*, 112 Ind. 533; *Louisville, etc., R. W. Co. v. Hubbard*, 116 Ind. 193.

The eighteenth instruction asked by the appellants was properly refused. It is not the duty of the court to direct the jury as to what effect shall be given to admissions of a party.

Some questions not specifically noticed by us in this opinion are argued, but we deem it only necessary to say that we have examined with care all of the questions presented, and are satisfied that there is no error justifying a reversal of the judgment.

Judgment affirmed.

Filed April 22, 1890; petition for a rehearing overruled Sept. 16, 1890.

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No. 15,480.

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## THE STATE, EX REL. WORRELL, v. PEELE.

**OFFICE AND OFFICER.—Executive Appointment Before Vacancy.—Surrender of Office by Incumbent.**—An appointment made by the Governor to an office rightfully held at the time of the appointment by an incumbent, whose term has not expired, is void. The surrender of the office to the appointee by such incumbent does not validate his void appointment, nor can any future act of the Governor validate such appointment.

**SAME.—Chief of Bureau of Statistics.—Certificate of Election by Legislature.—Governor's Commission.**—The General Assembly, assuming to divest the Governor of the power to appoint the chief of the bureau of statistics, in contravention of the Constitution, itself elected such officer. Upon his election, a certificate thereof having been presented to the Governor, the Governor issued to him a commission in which was recited the nature of his title, and that he was commissioned as the elect of the General Assembly. It further appeared by the records of the executive office that the commission was issued because of the election by the General Assembly.

**Held,** that the issuing of the certificate was not the exercise of the appointing power, and conferred no title to the office.

**SAME.—Records of Governor's Office.—Evidence.**—The records of the Governor's office mentioned above are competent evidence in a suit by a subsequent appointee of the Governor contesting the right of such person commissioned by the Governor to hold the office.

**SAME.—Appointee of Legislature under Void Election.—Governor's Commission.—Effect of.**—A commission issued by the Governor to an appointee of the Legislature under a void election, which recites that it is issued because of such election, can not be given the effect of an executive appointment upon the theory that all persons being presumed to know the law, the Governor knew that the sole power of appointment was possessed by him, and not by the Legislature, at the time of the issuing of the commission.

**SAME.**—A commission by the Governor to an officer, which recites that the person commissioned derives his claim of title because of an election by the Legislature, and is commissioned because thereof, is conclusive that such person is not the Governor's appointee.

MITCHELL, C. J., and ELLIOTT, J., dissent.

From the Marion Superior Court.

*L. T. Michener*, Attorney General, *A. C. Harris*, *A. J. Beveridge*, *J. H. Gillett*, *L. M. Campbell* and *F. H. Blackledge*, for appellant.

*J. E. McCullough*, *L. P. Harlan* and *S. J. Peelle*, for appellee.

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BERKSHIRE, J.—This is the second time this case has been in this court. *State, ex rel., v. Peelle*, 121 Ind. 495.

When the case was first before the circuit court judgment was rendered for the appellee upon a demurrer to the complaint. From the judgment so rendered an appeal was prosecuted to this court.

In this court the judgment was reversed, and the cause remanded, with directions to the court below to overrule the demurrer to the complaint.

When the cause again came before the circuit court the appellee answered in two paragraphs.

The first paragraph was a special denial, and the second paragraph the general denial.

It would have been proper practice had the appellant filed a motion to strike out the first paragraph as an encumbrance to the record, notwithstanding there would have been no available error had such a motion been filed and overruled.

Several paragraphs of reply were filed to the first paragraph of answer, but regarding it as a mere denial of the allegations in the complaint, the reply becomes wholly without importance.

The cause being at issue was submitted to the court for trial, and a finding made thereafter for the appellee.

The appellant moved the court for a new trial, which motion the court overruled, and the proper exception was reserved.

Judgment was then rendered for the appellee, and from that judgment this appeal is prosecuted.

When the case was here the first time the whole contention was as to the power of the Legislature under the Constitution to designate the incumbent to the office in question.

The appellee rested his claim to the office upon an election by the Legislature, and the appellant's relator relied upon an appointment from the executive of the State.

The appellee now claims title to the office by virtue of an

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appointment from the executive of the State, while the appellant's relator assumes the same position as heretofore.

After the cause had been remanded to the court below, as the appellee had not yet addressed an answer to the complaint, he was not debarred from setting up by way of answer a different claim of title than the one already considered by this and the court below, if he in good faith believed he held any different title.

And the question now is, does the appellee hold the office in question by appointment from the executive department of the government?

As we now understand the position of the appellee, it is that he holds the office (1) by appointment from Governor Porter, and (2) by appointment from Governor Gray.

For two sufficient reasons the appellee received no appointment to the office in question from Governor Porter, the second of which applies with equal force to the action of Governor Gray :

*First.* At the time the appellee claims to have received his appointment from Governor Porter John B. Conner, Esq., was rightfully holding the office, and his term of office did not expire for one and one-half months thereafter. That the Governor could make no valid appointment under such circumstances it is only necessary to cite the well-considered case of *State, ex rel., v. Harrison*, 113 Ind. 434. But the contention is urged that even if the appointment was void when made, as Conner thereafter surrendered the office to the appellee, his appointment was thereby validated.

This position can not be maintained. The appointment being void at its inception, no act of the Governor could thereafter give it validity. It will hardly be expected that we take the time to cite authorities to support so plain a proposition. And it is sufficient to say that if the Governor could not validate his own void act Conner could not do so for him.

The surrender of the office by Conner to the appellee, we

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think, amounted to an abandonment thereof and created a vacancy therein, but if there were any doubt as to this proposition both parties have so treated it, and for all the purposes of this case we are bound to so hold.

After the vacancy had been created the Governor was authorized to fill it by appointment, and could have appointed the appellee, and if this had been done the appellee would have held the office by virtue of the appointment then made, and not because of the commission issued to the appellee before Conner abandoned the office.

Upon the question that the surrender of an office by its rightful incumbent to one claiming title thereto without right, does not give to the latter title thereto, we refer to *Turnipseed v. Hudson*, 50 Miss. 429 (19 Am. Rep. 15).

The second reason why the appellee did not secure an appointment from the executive is that the appointing power lodged with him under the Constitution was never invoked in behalf of the appellee, and so long as it was not called into exercise there could be no appointment, although the Governor could at any time call it into action.

It appears that the General Assembly assumed (and it was but an assumption) to take from the executive department the power therein vested under the Constitution to designate the incumbent of the office in question, and not only so but to legislate the rightful incumbent of said office out of office before the expiration of his term, and to take unto themselves the election of an incumbent to said office, and as the result the General Assembly elected the appellee and gave him a certificate of election.

The first election occurred on the 3d day of March, 1883, and upon a certificate thereof being presented to the executive he issued the following commission :

*"The State of Indiana. To all who shall see these Presents, Greeting :*

*"Whereas, It has been certified by the proper authority that, at a joint convention of the two Houses of the fifty-*

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third General Assembly, held in the hall of the House of Representatives, March 3d, 1883, that William A. Peelle, Jr., was elected Chief of the Bureau of Statistics.

"Therefore, Know ye, that in the name and by the authority of the State aforesaid, I do hereby appoint and commission William A. Peelle, Jr., Chief of the Bureau of Statistics aforesaid, to serve as such for the term of two years from the 8th day of March, 1883, and until his successor shall have been elected and qualified.

"In witness whereof, etc.

"By the Governor:

ALBERT G. PORTER.

"W. R. MYERS, Secretary of State."

There was no pretence that the appellee held any other title to the office than that which the said election conferred upon him, and when we remember the aggressive attitude of the General Assembly at that time with reference to its power to elect the incumbents to a large class of offices, including the one in question (and of this we take judicial knowledge), the appellee would not have been willing to have recognized the executive department as the source of his title. The Governor was careful to recite in the commission the nature of the appellee's title and that he commissioned him as the chosen of the General Assembly. That it was the purpose and intention of the Governor, when he issued the commission, to deliver to the appellee the evidence of his title as derived from the Legislature, and to make it distinctly appear that he was in no sense the appointee of the executive, is so manifest that there is no ground for a contrary contention to rest upon. But in addition to what appears on the face of the commission, the records of the executive office disclose the fact that the commission was issued to the appellee because and on account of his election by the General Assembly. We know of no sufficient reason why these records are not competent evidence. They are the records kept in a public office of the official acts of the chief executive officer of the State.

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But see *Marbury v. Madison*, 1 Cranch, 137. But it still further appears that after the appellee received his commission from Governor Porter he recognized the Legislature, and not the executive, as the source from which he derived title to the office.

The following is the oath which was administered to him and endorsed on his commission :

*"State of Indiana, Marion County, ss. :*

"I, William A. Peelle, Jr., do solemnly swear that I will support the Constitution of the United States and of the State of Indiana, and that I will honestly and faithfully discharge my duties as Chief of the Bureau of Statistics, for the term for which I have been elected, to the best of my ability, so help me God. WILLIAM A. PEELLE, JR.

"Subscribed and sworn to before me this 9th day of March, 1883. S. P. SHEERIN, Clerk Supreme Court."

But it is contended that by some kind of legal fiction the appellee, each time he was commissioned by the Governor, became his appointee.

This contention is not very clearly defined, but proceeds, as we understand it (in part, at least), upon the theory that all persons are presumed to know the law, and that this presumption applies as well to public officers as to individuals; and, as Governors Porter and Gray are presumed to have known, when they commissioned the appellee, that the General Assembly had no power to elect him to the office, that the presumption must prevail that they intended by their official acts in commissioning him to appoint him to the office, and that this presumption must prevail, over their expressed intention to the contrary; or, to express the contention in other language, though they intended by their official acts to do one thing, and, in fact, did what they intended, that in law they did something else. This is carrying the doctrine of presumptions beyond precedent, and, we think, beyond reason.

For some purposes the presumption contended for prevails,

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but it is never applied to a question such as we now have under consideration.

It is usually recognized in the construction of contracts, and the enforcement of penal statutes; but we know of no case where it has been allowed to give to the official act of a public officer a different legal effect than the act itself expressly declares was intended. See *Citizens, etc., Savings Ass'n v. Friedley*, 123 Ind. 143.

On the 9th day of February, 1885, the Legislature again elected the appellee to the office in question, and thereafter, upon a certificate of election, the Governor issued to him a commission.

In 1887 there was no election, and the appellee continued to hold the office until 1889, when the Legislature again elected him to the office, and on presentation of his certificate of election to the Governor, a commission was refused, and the Governor having appointed the appellant's relator and commissioned him, this controversy arose.

The following is the appellee's commission from Governor Gray:

*"The State of Indiana, To all who shall see these presents, Greeting:*

*"Whereas, It has been certified to me by the proper authority that William A. Peelle, Jr., has been elected to the office of chief of the bureau of statistics, of the State of Indiana, by the General Assembly on the ninth day of February, A. D. 1885.*

*"Therefore, Know ye, that in the name and by the authority of the State aforesaid, I do hereby commission the said William A. Peelle, Jr., as said chief of the bureau of statistics of the State of Indiana for the term of two years from the eighth day of March, 1885, and until his successor shall have been elected and qualified.*

*"In witness whereof, etc.*

*"By the Governor:*

ISAAC P. GRAY.

*"WILLIAM R. MYERS, Secretary of State."*



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We have nothing to add with reference to Governor Gray's action, except to say that he seemed to be more careful, if possible, than his predecessor to emphasize the fact that the appellee was not his appointee, but was commissioned as the chosen of the General Assembly. The word "appoint" is found in the commission issued by Governor Porter, but nowhere appears in that of Governor Gray.

But the further contention of the appellee is, that as the appointing power was lodged with the executive of the State, his purpose or intention in commissioning the appellee can not be inquired into; that notwithstanding the purpose is disclosed in the face of the commission, all of its recitals must be disregarded, and the commission treated as an appointment made by the executive. Much that we have already said is here applicable.

This is but contending for a conclusive presumption that you must take an officer to mean one thing when he does another.

As the appointing power was lodged in the executive when he commissioned the appellee, had the commission recited an appointment, or had it been silent as to the source of the appellee's title to the office, then no doubt the commission would have been conclusive, for the very good reason that the mental operations of the Governor's mind, unexpressed in the act, could not be inquired into, and if for no other reason such inquiry would be impracticable. But where the source of title is lodged somewhere else than with the executive, his commission is only *prima facie* evidence of title. *Board, etc., v. State, ex rel.*, 61 Ind. 379; *Reynolds v. State, ex rel.*, 61 Ind. 392; *Hench v. State, ex rel.*, 72 Ind. 297; *State, ex rel., v. Chapin*, 110 Ind. 272; *Marbury v. Madison, supra*.

This court has gone so far as to hold that even after the Governor has issued a commission, if it appears that he has commissioned a wrongful claimant, to the prejudice of one

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who is rightfully entitled to the office, he may issue the second commission. *Gulick v. New*, 14 Ind. 93.

The same reasons which make the Governor's commission conclusive, when silent as to the source of title, that the person commissioned is the Governor's appointee, where he has the power to appoint an incumbent to an office, render his commission conclusive that such person is not his appointee when it recites that the person commissioned derives his claim of title because of an election by the people or Legislature, and is commissioned because thereof.

We hold that when the appellant's relator was appointed there was a vacancy in the office, which the Governor was empowered to fill by appointment until there should be an election by the people.

Judgment reversed, with costs.

Filed May 15, 1890; petition for a rehearing overruled Sept. 17, 1890.

#### DISSENTING OPINION.

ELLIOTT, J.—I am so strongly convinced that the law is with the appellee that I can not assent to the prevailing opinion. The importance of the question involved requires a statement of my reasons for dissenting, and this statement I shall make without elaboration.

Governor Porter issued to Peelle a commission in March, 1883, and under that commission he entered into possession of the office. At the expiration of the term designated in the commission issued by Governor Porter, Governor Gray, then the Governor of the State, issued a commission to Peelle, and under these commissions he continued in undisturbed possession of the office, discharging its duties, and recognized as an officer *de jure*, by all the departments of the government until this action was brought. He entered into office under Governor Porter's commission, and continued under that of Governor Gray. He entered office, therefore, by executive sanction, and his continuance in office was by

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executive authority ; for, either this must be true, or else it must be true that no executive power or function was exercised in commissioning him, and surely in every commission there is some expression of executive judgment.

The law of the case, as declared on the former appeal, which controls us now, whatever may be our individual opinions, is that the legislative election in 1883 was utterly void ; and if it was void Peelle could not have entered into the office, nor have held it under that election ; for it is absolutely inconceivable that a void act can confer a right or title. But Peelle did go into office, and has continued there for nearly seven years, and the only power which could put or keep him there was and is that of the chief executive of the State ; and the chief executive, by the commissions issued to him, authorized him to enter into the office and to continue in it, so far as it was in the power of the chief executive to do so. The chief executive alone had power to put and keep him in office, and it was the chief executive that did put him into office and continue him there by designating him as the person entitled to the office in the commissions issued to him. It seems clear to me that the only power to which Peelle's appointment is referable is the executive power, for there is no other to which it can, by any possibility, be referred.

The fact that Governors Porter and Gray recited in the commissions issued by them that Peelle was elected by the General Assembly, and that he was commissioned because he was so elected, does not prove that the minds of the chief executives did not assent to and confirm his appointment. They knew the law ; they knew that they alone possessed the appointing power ; and, knowing this, they designated him as the person to fill the office, and thus gave him the place by their own acts, for it was in their power, and in theirs alone, to withhold the office or to bestow it upon him. No other department of the government could bestow or withhold the office. The law, as declared on the former ap-

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peal, is not a new law; for, according to the decision, by which we are bound, it has existed since the adoption of the Constitution, and it was known to the Governors of the State at the time the commissions were issued; for no man can be deemed ignorant of the law, certainly not the highest officers of the State.

Neither Governor Porter nor Governor Gray was the mere agent or clerk of the General Assembly; for, in appointing to office, the Governor exercises a power vested in him by the Constitution. He is beyond legislative control in all cases where he exercises his constitutional prerogative, and that was exercised in this instance. What may be the power of the Governor under a valid statute is a question with which we have here not the remotest concern. Here the commissions were issued because the chief executive had the constitutional power to issue them by virtue of his prerogative. He could not, indeed, issue them by virtue of any other right or power vested in him.

In exercising his constitutional prerogative the Governor exercises his own will and judgment. No one can share the power with him, nor divide the responsibility. As the issuing of the commissions were executive acts, under the Constitution, they express the executive judgment and will, for they can express no other in a case such as this, where the Governor possesses the whole and the exclusive appointing power.

If either Governor Porter or Governor Gray exercised the constitutional prerogative of the chief executive—and in this instance no other could have been exercised—then what moved them to do it, or what reason, belief, motive or opinion influenced them is not a question for judicial cognizance, nor can it be under our Constitution. To attempt to ascertain in any mode or under any circumstances, or by any process or procedure, what influence controlled the mind and judgment of the Governor, would be an invasion of the executive domain which no authority will warrant nor any principle justify. If the courts can by one mode, whether

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by examining the commission or by some other, inquire what belief, motive or opinion influenced the judgment of the Governor, they can do so in any mode, and this would subject the exercise of executive power to judicial control. Our Constitution expressly forbids that this should ever be done. It can not be said that there is one mode in which the inquiry may be prosecuted and no other, for once it is granted that the question is a judicial one, then all modes are open to the courts and they may probe the executive mind in every method known to the law. I affirm that the courts can not prosecute any inquiry for the purpose of ascertaining what influenced the Governor to issue a commission in such a case as this, for it is a question over which the courts have no jurisdiction.

In a case where the power to appoint resides exclusively in the Governor, and where he writes the name of a person in a commission and delivers it to him, he exercises his constitutional prerogative, for he can exercise no other. When it is ascertained that the Governor has issued a commission, there the power of the courts terminates.

No ingenuity of invention, nor any subtilty of argument, can make it appear otherwise than that in the judgment of Governor Gray and of Governor Porter, Peelle was the man entitled to the office. This was the executive judgment, and the executive judgment is conclusive, for the sole and absolute power of appointing to an office which it is the prerogative of the Governor to fill by appointment is in the Governor. His judgment, however influenced, no court can supervise. Even if it be true that the executive judgment was misled or was controlled by an erroneous view, still it was the executive judgment, and as such beyond review. The executive judgment was called into exercise and the executive pen wrote the name of the man designated to fill the office. If there was an exercise of executive judgment, no matter how invoked or upon what ground it proceeds, it is unimpeachable, for there is no tribunal that has jurisdic-

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tion to investigate the question of executive conduct in cases where, as in this, the power of deciding resides wholly in the Governor.

It is useless to cite as authority or as illustrations cases where the appointing power is not exclusively vested in the Governor, for they have not the remotest application to such a case as this. Such cases prove nothing at all to the point, nor prove anything that anybody denies, for all concede that where the Governor has not the exclusive appointing power, his commission is not the vehicle for conveying the title to the office. But even in such cases it does convey some expression of the executive judgment.

It must be true that a commission issued by the Governor in a case such as this, where he has the whole appointing power, expresses his judgment, or it must be true that it is utterly void. To declare it void is to affirm that the highest officer of the State did a vain and idle thing, and this no court has power to do. Nor can it be assumed that the Governor, having the sole power to appoint, has violated his constitutional duty and his oath, and laid down his high constitutional prerogative at the feet of the Legislature. If it be adjudged that he yielded to an unconstitutional statute, surrendered his executive independence, and invested a man with the *indicia* of office, it is necessarily asserted that he wrongfully yielded his executive independence and violated his duty, and this assertion no court can rightfully make, for the plain reason that it can do no more than ascertain that the Governor has invested the man he names in his commission with the legal *indicia* of title. The act of issuing a commission, of itself and by its own force and vigor, expresses the executive judgment that the man named shall take the office, and no court can inquire what belief or opinion influenced the judgment of the chief executive.

The act of issuing a commission, where the Governor has the sole power of appointment, is absolutely, wholly and exclusively executive. It is impossible that it can be partly

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executive and partly legislative. It embodies the judgment of the Governor—this it embodies, and this alone—for it can not embody the judgment of any one else on earth. If it embodies any part of the executive judgment, no court can inquire what influenced that judgment without usurping power that belongs to another department of the government.

It is not within the power of the courts to examine any evidence, whether supplied by the commission, by the books of the Governor's office, or by the oral statements of the Governor, for the purpose of ascertaining whether he was influenced by an insufficient or an illegal cause to clothe the man whose name he wrote in the commission with the *indicia* of office. President Garfield wrote upon the commission of General Wallace "Ben Hur," and surely no one would assert that it was competent for the courts to inquire whether the presidential judgment was influenced by that great book. If, however, they can inquire into the motives or opinions of the appointing power in any case, they can do so in such a case as that instanced as an illustration as well as in any other. The only defensible conclusion is, that, if the instrument is a commission, what is written in it has no force as evidence beyond the fact that the person named is designated as the one who, in the executive judgment, is entitled to the office specified, and the courts have no power to push their investigation beyond that point. I repeat that we are here dealing with a case where the sole right to appoint resides in the Governor, for the rule is different where the Governor has not the appointing power; back of him in such a case is the source of right and title, but where he has the exclusive power, he is the exclusive creator of title and right. He is the sole fountain of right and power. No more need be known, and no more can legally be known, by the courts than that he has designated a person to fill an office by writing his name in a commission and delivering it to him.

But if it be conceded (a concession that is wholly unau-

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thorized) that the courts may search the commission to discover what belief, motive, or opinion controlled the mind of the chief executive and induced him to issue and deliver to the person designated the *indicia* of office, the utmost that can be said is that Governor Porter and Governor Gray were influenced by the legislative election to decide in his favor. Grant that this does appear, and so appear that the courts can regard it as evidence, and still it does not authorize the inference that the designation, or appointment, was not that of the Governor. All that can be inferred, awarding to the recital the utmost possible force as evidence, is that the legislative election influenced the two Governors, from whom Peelle holds commissions, to designate him for the office, for upon no principle of law or logic can it be assumed that those high officers yielded their official prerogatives to a void and dead legislative declaration. Those officers were bound, by the strongest and highest considerations that can influence men, to exercise their judgment, and to maintain the executive independence; and it must be assumed that they did their sworn duty, and did exercise their judgment. Either this must be true, or else it must be true that two of the highest officers of the State weakly yielded to legislative usurpation, and inexcusably surrendered their executive independence. But, more than this. If it be adjudged that the commissions were issued by the Governors because the Legislature bade them do it, then it is affirmed that two of the Governors of the State were ignorant of a principle of constitutional law and yielded, not to an actual command, but to a legislative declaration having not one spark of vitality. If it be conceded that the courts may search for evidence to prove what opinion, belief, or motive operated upon the mind of the Governor, it is much more reasonable to assume that the executive judgment simply coincided in the legislative selection or designation, and united with the Legislature in designating the person who should fill the office



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than it is to assume that the Governor yielded to an invalid statute, and acted simply as the passive agent of the Legislature. The assumption suggested as the reasonable one leads to no unjust or evil consequences, attributes no ignorance to either of the Governors, nor imputes to them any violation of duty, whereas the assumption that the recitals in the commission show that the Governor issued the commission solely because of the legislative election convicts the chief executive of the State of ignorance of constitutional law, or else of a wilful violation of duty and an indefensible surrender of a high prerogative, and in either event leads to evil consequences.

To construe the recitals of the commissions as evidence of a breach of duty by the Governor, or of ignorance on his part, is a wide stretch of judicial authority, and, certainly, no such construction should be resorted to where, as here, it is reasonable and natural to infer that the Governor yielded to the influence of the legislative election, not because it coerced him, but because it persuaded or convinced him that the choice or selection was a proper one. It is neither unusual nor improper, as every one knows, for the Governor to consult other officers or citizens, and recommendations are often made to the appointing power in behalf of applicants for office. This is illustrated by the cases where postmasters are designated by an election held by the people, for, while such an election may influence the President to make the appointment, it does not coerce his judgment, and if he should recite in his commission that the person so chosen was appointed because of his election, we suppose no one would think of questioning the validity of the appointment. We have no more right in this instance to assume that the election by the Legislature coerced either Governor Porter or Governor Gray, than a court would have to assume, in the case supposed, that the election by the people had coerced the President.

If we are to strictly adhere to the words of the commission, and regard only the letter of the instrument, then the

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commission given Peelle by Governor Porter is conclusive, for it is written therein that "in the name and by the authority of the State aforesaid I do hereby appoint and commission William A. Peelle, Jr., chief of the bureau of statistics." If the recitals control, then, it is impossible to deny that Governor Porter did appoint Peelle to the office.

Under the appointment made by Governor Porter, Peelle was inducted into the office in 1883, and he continued in office undisturbed until this action was brought, nearly seven years afterwards. For almost seven years he has been in office, and it seems to me very doubtful whether, after such a lapse of time, any one can be heard to aver that, when Governor Porter appointed him, there was no vacancy. I am, at all events, thoroughly convinced that the relator can not question the action of Governor Porter. To aver that there was then no vacancy is to aver that Governor Porter was ignorant of the law. And it is more, for it is to aver that for more than six years all of the executive, legislative, and administrative officers of the State were ignorant of the fact, if it be fact as assumed, that Peelle was a usurper. But still more than this, Mr. Conner, who, it is assumed, was the incumbent when Peelle was appointed by Governor Porter, yielded the office without objection, and asserts no title, for the title is here asserted by one who claims through an appointment made more than six years after the appointee of Governor Porter had taken possession of his office. I know of no authority, nor of any principle, that will authorize any court, or any officer, to sit in judgment on the action of Governor Porter at the demand of one whose sole and only claim to the office is an appointment made six years and more after Governor Porter's appointee took possession of the office.

Nor do I believe that it can be justly asserted that from the time Mr. Conner yielded the office it has been vacant. When Peelle entered the office, six years ago and more, under Governor Porter's appointment, the vacancy was filled,

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or else Mr. Conner is still the officer *de jure*. That it was in fact filled no one will deny. That it was so in law is my firm conviction. It may be true that when Governor Porter appointed Peelle there was no vacancy, but when Mr. Conner yielded the office, as it is asserted he did do, there was a vacancy, and this vacancy was filled by Mr. Peelle's entrance under Governor Porter's appointment. As the sole power of appointing was, at that time, in Governor Porter his commission operated to place Peelle in office as soon as the vacancy occurred, and Governor Gray's commission continued him there. It may be true (it is immaterial whether it be so or not) that if Peelle's right had been challenged by Mr. Conner, or if Governor Porter had commissioned another, Peelle could not have rightfully held the office under Governor Porter's commission, but however this may be, it can not be true that what occurred under executive sanction, twice manifested, more than six years ago, can be reviewed at the suit of one whose claim is founded on a commission only a few months old.

It is assumed that Mr. Conner abandoned the office, and if, therefore, it ever became vacant it became so when Mr. Conner abandoned it in 1883, if he did abandon it, and at that time the Governor of the State had an unquestioned right to fill it, and Governor Porter did attempt, at least, to fill it by appointing Mr. Peelle, and the only person who could legally complain was Mr. Conner, for if Peelle's appointment was invalid, then Mr. Conner, by force of the constitutional provision which rules the question, held over, and he only was wronged.

In this case the relator has the burden of establishing two things: *First*. The strength of his own title, and *Second*. The weakness of Peelle's, and if he has weakened Peelle's title it is because he has shown that Mr. Conner was entitled to the office, and has thus shown that he has himself no title. He is "hoist by his own petard." If, as the argument of the relator assumes from beginning to end, the two Gov-

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ernors who issued Peelle's commissions were mistaken as to the law, then, so we must presume, was Mr. Conner, and if he was he did not abandon the office, and he it is, who is now, upon the relator's own theory, entitled to the office. If Peelle by virtue of the unconstitutional statute under which the Legislature assumed to elect him has kept any person out of office it is Mr. Conner and not Mr. Worrell. If Mr. Conner were here claiming the office there would, to my mind, be much more difficulty in vindicating Mr. Peelle's claim, for if an officer yields to a law believed at the time by the executive and legislative departments of the government to be valid, and is by it coerced out of office, he can not be adjudged to have abandoned the office. But it is doubtful whether it would be competent, even at the suit of Mr. Conner, to reach back over a period of nearly seven years and review the action of Governor Porter; it is, however, quite clear that it is not competent to do it at the suit of the relator who was a stranger until May, 1889.

If Peelle wrongfully put any one out of office by entering into it, that one was Mr. Conner, and if there is any one who has a claim to the office, except Peelle, it is Mr. Conner. If there is and has been no vacancy in the office it must be for the reason that Mr. Conner was never rightfully ousted, and if there was no vacancy when Governor Porter and Governor Gray acted, there was none when Governor Hovey issued the commission to Mr. Worrell, six years later.

It is inconsistent to assert that Governor Porter and Governor Gray were coerced into putting Peelle into office and keeping him there by the legislative election, and that all they did was to obey the direction of the Legislature, yielding to it their own judgments and surrendering their own high constitutional prerogatives, and yet hold that Mr. Conner, in yielding to coercive measures that controlled the highest officers of the State, voluntarily abandoned an office to which he was of right entitled. To me it seems illogical to assert that the two Governors were so constrained by leg-

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islative action that they did not exercise their free judgment and constitutional rights, and yet hold that a subordinate officer, who yielded to the same action of the Legislature, acted of his own free will and uncontrolled judgment and voluntarily abandoned his office.

If Conner did not abandon the office he is still the *de jure* officer, and if he is, the appellant's relator has not the shadow of a claim. Conner did not abandon the office if he merely yielded to the same power which, as the relator asserts, controlled and coerced Governor Porter, and left the office because he was forced by law to do so. It is impossible to conceive how it can, with consistency, be asserted that there was no vacancy in 1883, because Mr. Conner was the officer *de jure*, and yet be asserted that as Mr. Conner was forced out of the office in that year it lets the relator in six years later. Nor is it easy to conceive any rational theory upon which the relator can lay hold of Mr. Conner's rights to defeat Peelle, for as Mr. Conner is not before the court no question as to him can be determined, and, certainly, no right of Mr. Conner's can be made available to the relator who had not the remotest connection with the case until six years after Peelle, as the relator now claims, wrongfully asserted title against Mr. Conner.

The case seems to me very clear upon principle, but authorities are not wanting.

That executive powers and duties are beyond review by the courts is fully settled. *Smith v. Myers*, 109 Ind. 1, and authorities cited p. 7.

That the commission of an officer who, as is true of this case, has the sole and exclusive appointing power, is a conclusive expression of the judgment of the officer invested with that power, is affirmed in strongly reasoned cases, and, so far as I have been able to ascertain, is denied by none. In a case where the officer having the sole power of appointment, erroneously supposed that he must act upon the action of a legislative body, the court said: "The essential thing

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is the fact of appointment. That might have been contained in a letter addressed to the persons appointed, or to the public. If the paper was signed for the purpose of making or evidencing the appointment, all the rest is mere matter of form and unimportant." *People, ex rel., v. Fitzsimmons*, 68 N. Y. 514. In another case the court said: "In such a state of the case it is only necessary that the person claiming the office shall show that the officer having the power to appoint has exercised that power and decided in his favor." *Hoke v. Field*, 10 Bush, 144 (19 Am. Rep. 58).

That there is no abandonment of a public office where the person yields it in deference to a statute which is afterwards declared to be unconstitutional, is adjudged in the very strongly reasoned case of, *Turnipseed v. Hudson*, 50 Miss. 429 (19 Am. Rep. 15), where the authorities are collected and ably reviewed.

That the law is that if Mr. Conner did not abandon the office by yielding to an unconstitutional statute, the implied or express declaration of Governor Porter or Governor Gray did not, and could not, create a vacancy is settled by our own decisions. *Board, etc., v. Johnson, ante*, p. 145; *State, ex rel., v. Harrison, supra*.

Whatever view may be taken of this case it seems clear to me that the relator has no title to the office, and if he has not, then there can be no question as to the correctness of the judgment of the trial court. Whether Mr. Peelle or Mr. Conner is entitled to the office is a much more doubtful question than the question presented by the relator's assertion of title.

MITCHELL, C. J., concurs in the opinion of ELLIOTT, J.

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No. 15,023.

## MCGUIRE ET AL. v. THE STATE.

**RECOGNIZANCE BOND.**—*Default.*—*Judgment of Forfeiture.*—In order to maintain an action upon a recognizance bond it is necessary that the court should enter a formal judgment of forfeiture at the same term of the default. A judgment of forfeiture entered at a subsequent term is void. The fact that the recognizance is a continuing one does not alter the rule. COFFEY, J., dissents.

**SAME.**—*Evidence.*—In such action, where the only evidence introduced is the bond, the entry of default and judgment of forfeiture, no evidence being introduced showing the bond to have been executed by the order of the circuit court, or that a criminal proceeding was pending against the defendant at the time the bond was executed, a finding adverse to the defendants is not sustained.

From the Fulton Circuit Court.

*M. L. Essick* and *O. F. Montgomery*, for appellants.

*L. T. Michener*, Attorney General, *G. P. Drummond*, Prosecuting Attorney, *M. A. Baker*, *G. W. Holman*, *R. C. Stephenson* and *J. Rowley*, for the State.

OLDS, J.—On the 24th day of October, 1885, the appellants, Patrick McGuire, Theodore Montgomery, Joseph Sharp, and Matthew McGuire, entered into a recognizance in the sum of \$2,000, conditioned for the appearance of Patrick McGuire before the judge of the circuit court on the second day of the next term thereof, and at each succeeding term of such court thereafter, to answer the charge of murder, and abide the order of the court until said cause is determined, and not depart without leave. At the November term, 1888, of the Fulton Circuit Court the defendant, Patrick McGuire, failed to appear, and he and the other appellants, the sureties on the recognizance, were each properly called, and defaulted, and such default properly entered of record. At the next succeeding term of court, in February, 1889, there was a judgment of forfeiture of the recognizance entered. The complaint in this case is upon the recognizance, and alleges the returning of an indictment; a trial by

jury, the Hon. George Burson presiding as judge; a disagreement of the jury; and that afterwards the defendant applied for and was admitted to bail in the sum of \$2,000, and the execution of the recognizance; the failure of the defendant to appear for trial at the November term, 1888, of said court; and the taking of default, and entry of the same of record; and the judgment of forfeiture at the next succeeding term of said court.

A demurrer was filed to the complaint, and overruled, and exceptions taken; trial and judgment for the appellee. The evidence introduced consisted of the bond and the entries of default at the November term, 1888, and the judgment of forfeiture at the February term, 1889, a motion for a new trial overruled, and exceptions, and error properly assigned.

It is contended that a judgment of forfeiture is necessary, and that a recovery can not be had upon a recognizance, except it be supported by a judgment of forfeiture, and that such judgment can not be rendered at a term subsequent to the term at which the defendant fails to appear in accordance with the requirements of the recognizance, and default is taken against him and his sureties; and as it appears by the complaint in this case that no judgment of forfeiture was entered on the bond at the time when the defendant failed to appear, and he and his sureties were called and defaulted, that the complaint is bad. It seems to be the settled law of this State, by numerous decisions of this court, that it is not sufficient to call and default the recognizers, but that it is necessary that the court should also enter a formal judgment of forfeiture at the same term of the default. *Rubush v. State*, 112 Ind. 107; *Friedline v. State*, 93 Ind. 366; *Kiser v. State*, 13 Ind. 80. There are other decisions of this court to the same effect. In most of the cases it does not appear whether the recognizances were continuing or not; but this fact, we think, can make no difference, as the object and purpose of a continuing recognizance is to avoid the renewal of the same at each term at which a cause may be continued,



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and the recognizance continues in force from term to term, in case of continuances, and requires the defendant to appear from term to term. The statute expressly provides that an action shall be commenced by the prosecuting attorney upon the recognizance as soon as the forfeiture is entered, but the arrest of the defendant thereafter does not defeat a recovery or collection of the judgment rendered upon a forfeited recognizance; so that upon a continuing recognizance, as well as upon one which is not continuing, a default may be had, and judgment of forfeiture entered, and suit brought for the collection at any time when the defendant fails to appear as required by its terms. If, after default is taken, the defendant is again arrested and brought into court, he would have to execute a new bond in order to be released from custody. In the case of *State v. Thistlethwaite*, 83 Ind. 317, it is suggested, but not decided, that a *nunc pro tunc* entry of judgment of forfeiture may be made on notice being given at a subsequent term; but no *nunc pro tunc* entry was made, or sought to be made, in this case, but default was entered at one term, and at a subsequent term, without notice to the recognizers, the court entered a judgment of forfeiture; and even a *nunc pro tunc* entry can not be made except where the act was done and omitted to be entered. The judgment of forfeiture entered at the February term was void. The court erred in overruling the demurrer to the complaint.

The next question presented is as to the sufficiency of the evidence to support the finding and decision. The bond and entry of the default and the judgment of forfeiture were all the evidence introduced in the case. This is not sufficient evidence to sustain a finding, even if there had been a valid judgment of forfeiture. It is necessary to prove as well as to aver in the complaint that the bond was taken in the due process of law by a proper court or officer. This was not done in this case. There was no evidence to show by what authority the bond was taken, or that any criminal proceedings were pending against the defendant Patrick Mc-

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Guire at the time it was executed. *Hannum v. State*, 38 Ind. 32; *Hawkins v. State*, 24 Ind. 288; *Griffin v. State*, 48 Ind. 258; *State v. Wenzel*, 77 Ind. 428. It is contended that the presumption is that a bond taken by the circuit court is binding, and that it is not necessary to allege the facts necessary to give the court jurisdiction, and that the proceedings can not be attacked collaterally; but the trouble in this case is that no evidence was introduced showing the bond to have been executed by the order of the circuit court, or that a cause was pending in the circuit court against the defendant in which the recognizance was executed for the release of the defendant. There is a failure of evidence on this point, for which the judgment must be reversed.

Judgment reversed, with instructions to the court below to sustain the demurrer to the complaint.

COFFEY, J., dissents from so much of the decision as holds that it is necessary to enter judgment of forfeiture at the same term of entering the default on a continuing recognizance.

Filed Dec. 18, 1889.

ON PETITION FOR A REHEARING.

OLDS, J.—Counsel for appellee, in their brief for a rehearing, earnestly contend that the court erred in holding that a formal judgment of forfeiture is necessary in order to maintain an action upon the bond, and insist that under our statute all that is necessary is to enter a default.

We did not overlook the provisions of the statute, section 1721, R. S. 1881, in reaching the conclusion stated in the opinion. The statute, section 1721, provides that "If, without sufficient excuse, the defendant neglects to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and the recognizance of bail or

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money deposited as bail, as the case may be, is thereupon forfeited."

Section 1722 makes it the duty of the prosecuting attorney, as soon as such fact of forfeiture is entered, to proceed by action against the bail upon the recognizance, etc.

Construing the two sections together, it is clear that there shall be an entry of forfeiture. The entry of a default is not an entry of forfeiture. It seems to be the well recognized doctrine in the decisions of this court that it is necessary that a formal judgment of forfeiture must be entered. In *Friedline v. State*, 93 Ind. 366, it is said: "It is also objected to the complaint that it does not allege that, before the forfeiture, the appellant was three times called and required to bring into court the body of the accused in discharge of his recognizance. But the complaint does aver that a judgment of forfeiture was entered by the justice, and this implies that the proper steps authorizing such forfeiture had been taken."

In the case of *Fowler v. State*, 91 Ind. 507, it is held that section 1721 applies to proceedings before justices of the peace. In the case of *Hannum v. State*, 38 Ind. 32, it is said: "But \* \* it is not alleged or shown that there was any forfeiture. There can be no action without a forfeiture on which to base the action." The case of *Votaw v. State*, 12 Ind. 497, is cited in support of this statement, and that case holds that a forfeiture is necessary.

The same necessity of a formal judgment has been recognized in actions brought upon the recognizance as under the old system, when *scire facias* issued after the entry of the forfeiture, and that such formal entry is necessary under a system whereby a writ of *scire facias* issues, is universally held. *Eubank v. People*, 50 Ill. 496; *Banter v. People*, 53 Ill. 434; *Thomas v. People*, 13 Ill. 696; *Kennedy v. People*, 15 Ill. 418; *Barnes v. State*, 5 Yerger, 82; *Park v. State*, 4 Ga. 329.

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In *Friedline v. State*, *supra*, it is held that a judgment of forfeiture is conclusive, and imports absolute verity.

In the case of *Rubush v. State*, 112 Ind. 107, it is said that "The averment that the recognizance was by the court then and there forfeited, and the forfeiture thereof duly entered of record, necessarily 'implies that the proper steps authorizing such forfeiture had been taken.'" In all the decisions of this court in actions upon recognizances it is the recognized doctrine that there must not only be a default, but an entry of forfeiture.

We therefore adhere to the conclusion reached in the original opinion, that there must be a formal judgment or entry of forfeiture.

The petition for rehearing is overruled.

Filed June 25, 1890.

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No 14,115.

SHERWOOD, ADMINISTRATOR, v. THOMASSON.

**DECEDENTS' ESTATES.—Widow's Claim.—Petition.—Presumption as to Chastity.**—A widow in her petition to have the distributive share of the funds in the hands of the administrator set off to her, need not aver that she has not deserted her husband and that she was not living in adultery at the time of his death. Chastity is presumed in the absence of averments and proof to the contrary. In such action, the petition is sufficient if it apprises the administrator of the nature of the claim, and is sufficient to bar another action for the same demand.

**SAME.—Trial by Jury.**—Where an application is made for an order upon an administrator to pay over a sum of money out of a fund which remains in his hands for distribution to one who claims as distributee, no jury is allowable. In such case it is the duty of the court to hear the proof, and after determining who is entitled to the fund to order it paid to the parties proving their titles to their respective shares.

**SAME.—Widow.—Witness.**—In a suit by a widow against the administra-

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tor of her deceased husband to recover her share of the fund which remains in his hands for distribution, the widow is a competent witness.

From the Tippecanoe Circuit Court.

*A. L. Kumler* and *J. B. Sherwood*, for appellant.

*W. F. Severson* and *H. H. Vinton*, for appellee.

**MITCHELL, C. J.**—*Mary E. Thomasson*, as widow of *Solomon Romig*, deceased, asserted the right to a certain distributive share of the funds in the hands of the administrator of the decedent's estate. In the statement of her claim she alleged that all the debts of the decedent had been paid, and that there remained in the hands of the administrator \$10,000 for distribution. She averred that she was lawfully entitled to receive \$500 out of this fund as widow of the decedent, which amount she prayed the court to order the administrator to pay over to her.

It was not necessary for the claimant to show in her petition that she had not deserted her husband, and that she was not living in adultery at the time of his death. In the absence of averment and proof to the contrary, the presumption is in favor of chastity, and that a wife has not abandoned her husband to live in adultery with another.

The complaint or petition is not formally accurate, but it was sufficient to apprise the administrator of the nature of the claim, and to bar another action for the same demand. It shows that the claimant is asserting the right to receive \$500 as widow out of the fund or surplus on hand for distribution, after the settlement of the estate of her deceased husband. This is all that was required. *Windell v. Hudson*, 102 Ind. 521; *Davis v. Huston*, 84 Ind. 272; *Price v. Jones*, 105 Ind. 543.

There was no error in sustaining the demurrer to the second paragraph of answer. The petition proceeded upon the assumption that the claimant was entitled to receive \$500 out of a fund in the hands of the administrator for distribution, and that she was entitled to the above sum under the

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statute as widow. The facts alleged in the petition might raise an inference that she was entitled to receive more, but for all that appears, all that she was entitled to as widow except the \$500 claimed may have been paid. At all events that was all that was claimed. So far, therefore, as the answer assumed to set up a defence to an issue not tendered, or to the extent that it was not responsive to or in avoidance of an issue tendered by the petition, it was very clearly irrelevant.

The learned court, over the objection of the appellant, submitted the cause to a jury generally, as an action at law. This was error.

It is well settled that while an executor or administrator holds possession of a fund in his trust capacity, an action at law can not be maintained against him by a legatee or distributee to recover his share of the fund. 3 Williams Executors, 2046.

Anciently the administrator or ordinary, in right of the king, himself appropriated the residue of an intestate's estate, after payment of the debts, assuming to devote certain portions to pious uses, and to give certain other portions to the widow and children, if there were any. Statutes were afterwards passed which provided in detail for the distribution of the surplus of all estates. Enactments of this character are found in all the States.

It will appear from an examination of the statutes in this State that provision has been made whereby the court may order distribution to be made from time to time among creditors where claims have been allowed, and that after the filing of a final account showing a surplus for distribution, the court may, after hearing the proof, order distribution among the parties applying and proving their titles to their respective shares in such surplus. Elliott's Supp., sections 400, 409. Such a proceeding is regarded as equitable in its nature, the court having the authority to take into account any proper matter of set-off, such as advancements or the like,

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which ought to be deducted from the share of a distributee, and no jury trial is contemplated or allowable. Where claims have been filed against an estate, and, after having been disallowed, are transferred to the docket for trial, "The trial of such claim shall be conducted as in ordinary civil cases." Elliott's Supp., section 392. In such a case a jury trial may or may not be allowable, depending upon the nature of the claim. But where an application is made for an order upon an administrator to pay over a sum of money out of a fund which remains in his hands for distribution, to one who claims as a distributee, no jury is allowable.

The present is not a claim against an estate in the ordinary acceptation. *Shaffer v. Richardson*, 27 Ind. 122 (129). The claimant's right to a specified sum depends upon her relation to the decedent. When her relation is established her right to participate in the fund to an amount fixed by law is absolute, unless that right has been forfeited by her misconduct, or unless some equitable set-off sufficient to discharge the amount can be established. It is the duty of the court to hear the proof, and after determining who is entitled to the fund to order it paid to the parties proving their titles to their respective shares. *Roberts v. Huddleston*, 93 Ind. 173; *Taylor v. Wright*, 93 Ind. 121.

The evidence of the claimant was properly admitted. She was a competent witness. *Shaffer v. Richardson*, *supra*; *Hamlyn v. Nesbit*, 37 Ind. 284 (293).

Some other questions are discussed relating to the character and sufficiency of the evidence, but as the judgment must be reversed for the error above mentioned, we do not consider them.

The judgment is reversed with costs.

Filed May 1, 1890; petition for a rehearing overruled Sept. 17, 1890.

Wood v. Wood *et al.*

No. 14,355.

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## WOOD v. WOOD ET AL.

**PRINCIPAL AND SURETY.**—*Real Estate.—Purchase-Money.—Equitable Lien.—Parol Agreement.—Husband and Wife.*—D. W. agreed with J. W. that if the latter would become his surety in borrowing money with which to make the first payment on real estate for which he had bargained, he should have a lien thereon to secure him from loss as such surety. The real estate was purchased, the borrowed money expended in making the first payment, and with the knowledge and consent of the surety the conveyance was made to the wife of D. W. The principal failing to pay the note the surety finally executed his own note in satisfaction thereof. The remainder of the purchase-money was paid by the wife. The first payment by D. W. was on a debt he owed his wife. The wife, at the time of taking the conveyance, had knowledge of all the facts above stated, but did not know of the verbal agreement as to the lien. *Held*, disregarding the verbal agreement, which is ineffectual to create a lien by contract, that the surety, whose position is that of a general creditor, has no equitable lien upon the real estate on account of his payment of the note.

From the Jasper Circuit Court.

*E. P. Hammond* and *W. B. Austin*, for appellant.

*S. P. Thompson*, for appellees.

**BERKSHIRE, C. J.**—The facts involved in this case, briefly stated, are as follows:

McCoy and Thompson were bankers at Rensselaer, Indiana, on the 5th day of February, 1883, and on that day the appellee Daniel Wood, and the appellant executed their note to said McCoy and Thompson for \$111, due in one year, the said Daniel Wood being the principal in said note, and the appellant his surety.

When said note became due the said Daniel not being prepared to make payment thereof, it was taken up and a new note given by the said parties. Renewal notes were given from time to time until the 7th day of March, 1887, when the appellant executed his own note in payment and satisfaction of said indebtedness.



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That on said 5th day of February, 1883, one Christian Gish was the owner of the following described real estate in Jasper county, Indiana, to wit: The southwest quarter of the northeast quarter section 18, township 28, range 6, and continued so to be until the 8th day of February, 1883, when he conveyed the same by warranty deed to the appellee, Martha T. Wood; that the consideration to said Gish for the said real estate was \$200; one hundred dollars paid in cash, and the promissory note of the said Martha and Daniel executed for the sum of \$100, payable in one year from the date of said deed, secured by a mortgage executed by them upon said real estate. That the cash payment made to said Gish was the proceeds of said note first executed by the said Daniel and the appellant to said McCoy and Thompson, and was borrowed for that purpose; that when the said note was executed and loan made, the said Daniel had bargained with said Gish for the said real estate, and so informed the appellant, and promised and agreed with him that if he would become his surety in borrowing said money said real estate should be bound to him, and he should have a lien thereon to secure him from loss as such surety; that the appellant relied upon said agreement, and was induced thereby to become surety on said note. That the said conveyance was executed by said Gish to said Martha at the instance of the said Daniel, with the knowledge and consent of the appellant.

That after the said note which the said appellees had executed to said Gish became due, the same was paid by the said Martha, and she had no knowledge of said agreement as to said lien between the appellant and the said Daniel until long thereafter, and no knowledge of any intention on the appellant's part of asserting or claiming a lien upon said real estate; but she did know at the time she received said conveyance that Daniel and the appellant had executed their notes to McCoy and Thompson to obtain the money to make the first payment on the land, and that the appellant was Daniel's surety on said note, and that the money thus ob-

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tained had been used in making said first payment, and she knew then and thereafter that it had not been repaid.

The consideration which moved from Martha to Daniel was a credit of \$100 upon an indebtedness in the sum of \$235, which he had owed to her for nearly ten years. At the time the loan was made by McCoy and Thompson to Daniel he was insolvent, and has been so ever since.

During all of the foregoing transactions the appellees were husband and wife.

Upon the foregoing statement of facts the question which we are called on to determine is: Has the appellant an equitable lien upon the real estate described, on account of his said payment to McCoy and Thompson? We think he has not.

This court is more liberal than are the courts of most of our sister States in the recognition of equitable liens upon real estate, but we find no case decided by this court or elsewhere to support the theory of the appellant in this case.

In the case of *Dwenger v. Branigan*, 95 Ind. 221, the decision is placed expressly upon the ground that the relation of vendor and vendee existed between the parties.

In *Barrett v. Lewis*, 106 Ind. 120, the facts of the case as given in the opinion are as follows: "Hester A. Lewis conveyed a tract of land in Marion county to Gottfried Muhleman, and to secure a part of the purchase-price took a mortgage. Subsequently she obtained a decree of foreclosure, and upon a sale of the land made in pursuance of the decree, she became the purchaser, and received from the sheriff a certificate of purchase, in due form. Before the period of redemption expired, she sold and assigned the certificate and all her rights thereunder, to Lucy B. Barrett, who paid part of the consideration for the assignment in cash, and for the residue executed her promissory note, due in two years. It was stipulated in the note that it was given for 'purchase-money for real estate.' At the expiration of the year for redemption, which was about four months after taking the

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assignment, Mrs. Barrett received a sheriff's deed upon the certificate, and went into possession of, and has ever since continued to own, the land."

Upon the foregoing statement of facts it was held that the assignor of the sheriff's certificate was entitled to enforce a vendor's lien as against the title held by her assignee, and acquired through such assignment.

Under the facts of that case the assignor, if not technically a vendor, was one in equity.

As between the parties the note represented the unpaid purchase-money for the real estate to which Mrs. Barrett had acquired title; the parties had so recognized it in their contract, and it would have been contrary to the rules of equity and in violation of good conscience not to have recognized and enforced the lien. See *Jones Liens*, section 1094; *Yarborough v. Wood*, 42 Texas, 91.

In the well considered case of *Otis v. Gregory*, 111 Ind. 504, the conclusion reached was that the facts disclosed a payment of part of the purchase-money by the appellant for the execution of the conveyance to the appellee, and hence he was entitled to enforce a vendor's lien. The facts in that case, as we find them stated in the opinion of the court, are as follows: "On the 15th day of October, 1873, the plaintiff and her husband became indebted to the defendant in the sum of \$460. This indebtedness was secured by a mortgage executed by the plaintiff on her separate property in Michigan. Afterwards, in June, 1874, the plaintiff sold her Michigan property and purchased that in question in La Porte county. To enable her to make the purchase, it became necessary that she should be able to use the entire purchase-money arising from the sale of the Michigan property, including the amount due the defendant on his mortgage debt. The defendant agreed that he would release his mortgage on the property in Michigan, and permit the plaintiff to use the amount due him in paying the purchase-money of the La Porte county property, she agreeing to give him a mortgage

on the latter when the transaction should be completed. The defendant released his mortgage accordingly, and took a mortgage, executed by the plaintiff, without the joinder therein of her husband, upon the property described in the complaint. Mrs. Gregory paid for the property purchased with the proceeds of that sold. This last mortgage, it is averred, was executed in the State of Michigan, both parties believing in good faith at the time, that the law of Indiana, as in Michigan, empowered a married woman to encumber her separate real estate without the joinder of her husband. But for such belief, the defendant says he would not have released his mortgage on the Michigan property and received that on the property in Indiana."

In the case of *Strohm v. Good*, 113 Ind. 93, it was held that Mrs. Good, the appellee, held a vendor's lien upon the real estate there involved. The facts in that case, as given in the opinion, are as follows: "On the 27th day of April, 1883, Magdalena Good was the owner of a parcel of land, and on that day she and her husband entered into a written contract with Joseph Strohm, wherein she agreed to sell and convey it to him. Among other promises forming part of the consideration agreed to be paid for the land, was a promise on the part of Joseph Strohm to assume and pay a mortgage previously executed by Magdalena Good to Solomon Stahley. This mortgage covered the land purchased by Strohm, and also other lands of the mortgagor. The contract, as originally drawn, provided that Joseph Strohm should receive a deed on or before the 1st day of July, 1883, but, by a subsequent writing, the contract was so modified as to provide that he should receive a deed when he had paid one-half of the mortgage assumed by him. Prior to the time of the maturity of the mortgage debt, Magdalena Good desired to remove the encumbrance of the mortgage from the real estate embraced in it, but which was not sold to Strohm, and an oral agreement was entered into between her and Strohm wherein it was stipulated that if she would pay the

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mortgage debt, he would, when the first of the notes evidencing it became due and the deed was ready for delivery, pay one-half of the mortgage debt, and execute a mortgage for the remainder upon the real estate conveyed to him. Relying on this promise of Strohm, the appellee caused her agent, Isaiah Good, to pay the Stahley mortgage with his own money, agreeing with him that he should be repaid in accordance with Strohm's contract. Strohm requested that his wife, Mary Strohm, should be substituted as grantee, and this was done in the deed executed by the appellee and her husband. The deed was delivered on the 24th day of January, 1884, and was executed to Mary Strohm, the wife of Joseph Strohm, as requested by the latter. Of the contract between him and his vendor Mrs. Strohm had full knowledge, and she paid no consideration. Joseph Strohm repudiated his promise and refused to pay one-half of the amount of the mortgage debt in money, and also refused to execute a mortgage for the remainder." It is said in that case: "Mrs. Good had a right to protect her property by paying the mortgage, and, under the verbal contract, she had a right to have her *lien kept alive*. Until Strohm paid the purchase-money, as he had agreed to do, the lien remained in life, binding the land in his hands and in that of his wife, who claimed through him. There was no surrender or merger of this equitable lien, and it remained in force for the protection of the vendor."

The case of *Nichols v. Glover*, 41 Ind. 24, is summed up by the court, in a nutshell, as follows: "The question in this case resolves itself into this: If A. owes B. and A. conveys land to C., and has a lien for the purchase-money on the land so conveyed, and they all meet together and agree that C. shall execute his note to B. for the unpaid purchase-money, instead of giving the note to A., which is done, and B. releases A. from his debt, has B. a lien on the land conveyed by A. to C. for the purchase-money? We hold that he has. It is clear that if C. had given his note to A. for

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the unpaid purchase-money, A. might have assigned it to B. and thus transferred his vendor's lien to B. Or, if no note had been given by C. to A. for the purchase-money, yet A. might have, by a written instrument, assigned his vendor's lien to B."

A vendor's lien can not be created by agreement between the parties, but exists by operation of law. Jones in his valuable work on liens, at section 1064, says: "This lien does not spring from any agreement of the parties, and is wholly independent of any such agreement. Moreover, the fact that there is a verbal agreement of the parties that the vendee shall reconvey the land if he does not pay the purchase-price, does not prevent the enforcement of the lien; for such an agreement is void under the statute of frauds." See *Gallagher v. Mars*, 50 Cal. 23.

Where a vendor's lien once arises, it may be kept alive or waived by the agreement of the parties, but can not be thus created. Jones Liens, sections 1089-1090; *Strohm v. Good*, *supra*; *Yaryan v. Shriner*, 26 Ind. 364.

"Whenever the nature of the transaction is such that the existence of a lien is repelled, and consequently the lien does not arise by implication or operation of law, evidence can not be given of the declaration of the purchaser that the vendor would have a lien; for a right to charge lands dependent upon the agreement of the parties must be manifested by writing; it can not rest in parol." Jones Liens, section 1064. See section 70; *Printup v. Barrett*, 46 Ga. 407; *Stringfellow v. Ivie*, 73 Ala. 209.

As a vendor's lien must arise by implication, a lien which depends upon the agreement of the parties is not a vendor's or grantor's lien. "A lien reserved is a lien by contract. A lien for the purchase-money expressly reserved by a vendor in his deed of conveyance is a lien created by contract, and not by implication of law." Jones Liens, section 1111. So, also, is a mortgage lien a lien by contract. It can in no other way be created. In Indiana a specific lien upon real estate,

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dependent upon contract, can be created in but one of two ways; by reservation in the deed of the grantor; by mortgage duly executed by the owner; hence, the appellant, by the verbal agreement with Daniel, acquired no lien by contract. The further conclusion, therefore, must be that the said verbal agreement can have no controlling influence in the decision of the question before us.

Disregarding, as we do, the verbal contract between the appellant and Daniel, the situation is as follows:

McCoy and Thompson loaned a sum of money to Daniel Wood with which to make a purchase of real estate; to secure the loan the appellant became Daniel's surety to McCoy and Thompson; Daniel purchased the real estate, paid the money borrowed to the vendor, and with the appellant's consent, caused a deed to be executed to the appellee Martha.

Had the appellant loaned the money to Daniel to make the payment he would not have been entitled to a vendor's lien.

A mere loan of money in the purchase of land does not create a lien on the land as a security for its repayment. See Jones Liens, section 75; *Collinson v. Owens*, 6 G. & J. 4.

A lien will not arise in favor of one who advances money to pay the purchase-price for real estate purchased. Jones Liens, sections 75, 1067; *Chapman v. Abrahams*, 61 Ala. 108; *Gray v. Baird*, 4 Lea (Tenn.) 212.

In this last case the court said: "Be this as it may however, the court is of the opinion that the debt stayed by Marchbanks was not the purchase-money for the land. The land had been bought by Gray under a decree of the county court. He had paid for it. Hall had advanced or loaned him the money to pay for the land, and had taken his notes, retaining a lien on the face of them on his land. These notes were the basis of the judgment stayed by Marchbanks. This could in no sense be held to be the purchase-money of the land. That had been paid by Gray. This was a debt for

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borrowed money, advanced or loaned, it is true, to pay for the land, but still but a debt for loaned money. The lien on the face of the note did not make it such. That was a form of security carried out by the parties themselves, but is not a vendor's lien, but one by contract."

If money advanced to pay for real estate will not give the lender the right to enforce a vendor's lien, for stronger reasons may it be asserted that such a lien will not be implied in favor of the surety who signs a note given for borrowed money to pay for real estate.

When McCoy and Thompson loaned the money to Daniel Wood it became his money absolutely. He was under no legal obligation to purchase the real estate, and if he did so he might, or might not, as he saw proper, pay the money to the vendor. He could have used the money for any other purpose at his pleasure.

The transaction was one to which the appellant was not a party except that he loaned his name to Daniel Wood. It was a transaction between McCoy and Thompson on the one side and Daniel Wood on the other.

After the note had been executed to them, McCoy and Thompson would no more have been justified in paying the money over to the appellant, except upon the order of Daniel, than to have paid to the appellant any other money in their hands belonging to Daniel without such order.

It was Daniel, therefore, who furnished the purchase-money, and not the appellant. This seems to be clear; and as the appellant paid no part of the purchase-money he has no shadow of a claim to a lien on the land. His position is the same as that of any other general creditor. But if the appellant, because of the parol agreement made between Daniel and himself, was entitled to enforce a vendor's lien as against a purchaser of the real estate with notice of his lien, or as against a mere volunteer, it is probable, in view of the rule as declared in *Wert v. Naylor*, 93 Ind. 431, that



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Mrs. Wood would be regarded as a purchaser for value without notice, but as to this we decide nothing.

We find no error in the record.

Judgment affirmed, with costs.

Filed June 18, 1890; petition for a rehearing overruled Sept. 17, 1890.

124	554
133	38
124	554
134	67
124	554
149	318

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No. 15,477.

THE STATE, EX REL. TAYLOR, *v.* THE BOARD OF COMMISSIONERS OF WARRICK COUNTY.

COUNTY SUPERINTENDENT.—*Special Bond.*—*Refusal of County Commissioners to Accept.*—*Mandamus.*—*Title.*—*Collateral Attack.*—In an action brought by a county superintendent duly elected, qualified, and in possession of the office, to compel by mandate the approval of the special bond required by the school book law, an answer alleging that the superintendent was elected by means of a corrupt agreement entered into between the county auditor and such superintendent is bad. The title of a superintendent, duly elected and qualified, can be attacked only in a direct proceeding, and not by collateral means.

From the Warrick Circuit Court.

*D. B. Kumler, J. A. Hemenway and J. L. Taylor*, for appellant.

*A. Gilchrist and C. A. DeBruler*, for appellee.

COFFEY, J.—The relator was duly elected county superintendent of schools in Warrick county, by the trustees of said county, on the 3d day of June, 1889. He immediately filed his bond, to the approval of the county auditor, took the oath of office, and entered upon the discharge of the duties of his office as such superintendent.

The appellant did not file the bond required by the statute, known as the school-book law, acting under the belief that it was not necessary to file such bond until after the Governor of the State should issue his proclamation as provided

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for in section 10 of said law. The Governor issued his proclamation on the 29th day of July, 1889, and the 9th day of August following the relator tendered to the board of commissioners of Warrick county a good and sufficient bond under the terms of said law, and demanded its approval, which was refused.

This suit was brought to compel, by mandate, the approval of said bond.

The board of commissioners answered, in substance, that prior to his election as county superintendent the relator was trustee of one of the townships in Warrick county; that at said time the county had ten trustees, five of whom were of one political faith, and five of another political faith; that the relator belonged to one political party, and the auditor of said county to another; that the relator and said auditor entered into a corrupt agreement, by the terms of which the relator was to resign his said office of trustee and the said auditor was to appoint a trustee as his successor of the same political faith as said auditor; and that, in consideration of his resigning his said office of trustee, it was agreed that the relator should be elected by the trustees of said county, superintendent of the schools of said county; that pursuant to the terms of said corrupt agreement the relator did resign his said office of trustee, said auditor did appoint his successor, and the relator was elected by the trustees of the several townships of said county superintendent of the schools thereof; that the relator was elected by means of said corrupt agreement, and without it he could not have been elected.

Upon issues formed the cause was tried by the court, resulting in a finding and judgment for the appellees, over a motion for a new trial.

We are not favored with a brief by the appellees, and are not advised of the ground upon which the court based its judgment; but, in our opinion, the court erred in overruling the appellant's motion for a new trial.

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In all of its essential features, this case is like the case of *Board, etc., v. Johnson, ante*, p. 145, except in the matter of defence set up by the appellees. The appellant, at the time he tendered his special bond to the board of commissioners of Warrick county, had been duly elected, qualified and was acting as county superintendent of schools, was in the possession of the office and was discharging the duties pertaining thereto. Such being the case, the appellees could not attack his title in the collateral manner attempted by their answer. The public have an interest in the discharge of the duties of the office, and until such time as the appellee shall be ousted by a proper proceeding for that purpose, every one must recognize him as the legally elected and qualified county superintendent. *Leach v. Cassidy*, 23 Ind. 449; *State, ex rel., v. Jones*, 19 Ind. 356; *Redden v. Town of Covington*, 29 Ind. 118; *Gumberts v. Adams Express Co.*, 28 Ind. 181; *Creighton v. Piper*, 14 Ind. 182; *Kisler v. Cameron*, 39 Ind. 488; *McGee v. State, ex rel.*, 103 Ind. 444; *Parmater v. State, ex rel.*, 102 Ind. 90; *Mannix v. State, ex rel.*, 115 Ind. 245.

The certificate of election issued to the appellant, and his qualification as county superintendent, bar all inquiry into his right to hold the office, except in a direct proceeding for that purpose. *Parmater v. State, ex rel., supra*.

It is not denied that the appellant was elected county superintendent by the votes of a majority of the trustees of Warrick county, and that he duly qualified and entered upon the discharge of the duties of his office. No one is contesting his election, and no proceeding is pending to oust him. It is settled by the case of *Board, etc., v. Johnson, supra*, that he was entitled to have the bond in question approved at the time it was tendered. The appellees could not go behind his election and inquire into his title to the office. It was their duty to approve his bond. Having refused to do so, mandate is the proper remedy to compel them to per-

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 Ballew v. Roler *et al.*


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form that duty. *Gulick v. New*, 14 Ind. 93; *McGee v. State, ex rel., supra*; *Board, etc., v. State, ex rel.*, 61 Ind. 379.

The circuit court erred in overruling the motion for a new trial.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed June 24, 1890; petition for a rehearing overruled Sept. 17, 1890.

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 No. 14,151.

### BALLEW v. ROLER ET AL.

**VENDOR AND PURCHASER.—Vendor's Lien.—Principal and Surety.—Subrogation.**—J. became the surety of the purchaser of land on a note given to the vendor to secure the purchase-money. The purchaser mortgaged the land to the surety to secure him against loss. The surety, who had been compelled to pay the purchase-money, foreclosed the mortgage after the mortgagor's death.

*Held*, that the right of the surety was superior to that of the widow of the mortgagor, he being subrogated to the lien of the vendor to whom the purchase-money was paid.

*Held*, also, that the widow, until the purchase-money was paid, had only the right to redeem.

**SAME.—Former Adjudication.**—A decree of foreclosure estops a party from setting up any title acquired before the decree was rendered.

From the Tipton Circuit Court.

*W. R. Oglebay*, for appellant.

*J. N. Waugh* and *J. R. Kemp*, for appellees.

**ELLIOTT, J.**—The appellant, in her complaint, asserts title to the real estate therein described. The second paragraph of the answer of the appellees alleges that in 1868, John H. Reeder, since deceased, was the owner of the land in controversy; that he mortgaged it to William Jackman to secure and indemnify him against loss by reason of his undertak-

124	557
133	570
124	557
140	515
124	557
156	571
156	575
124	557
161	518
124	577
162	590

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ing as surety for Reeder; that Reeder died in April, 1875; that after the death of Reeder, the mortgagor, Jackman, the mortgagee, instituted a suit to foreclose the mortgage executed to him, making the widow and heirs of the mortgagor parties; that the plaintiff was the widow of Reeder, and that she has since married Lindsey Ballew; that in such suit a decree was entered foreclosing the mortgage and barring the equity of redemption of the appellant, as well as of all the other parties to the suit. It is further alleged that a sale was made on the decree; that the land was bought by Jackman, and that a deed was executed to him by the sheriff in due season. It is also alleged that the complaint, in the foreclosure suit, averred that the note which Jackman executed as surety was given by the appellant's husband to secure the purchase-money of the land in controversy to the person from whom the land was bought.

It is quite clear that this answer is good as a plea of former adjudication. The appellant was brought into court to answer as to her interest in the mortgaged premises, and she was thus afforded an opportunity to assert her claim, and, having failed to do so, she is concluded by the decree. There would be little reason for making persons parties to a foreclosure suit if the decree rendered was not effective to defeat their claim and bar their equity of redemption. Our decisions, extending over many years, uniformly hold that a decree of foreclosure estops a party from setting up any title acquired before the decree was rendered. *Lawrence v. Beecher*, 116 Ind. 312; *Adair v. Mergentheim*, 114 Ind. 303; *Bundy v. Cunningham*, 107 Ind. 360; *Craighead v. Dalton*, 105 Ind. 72; *Randall v. Lower*, 98 Ind. 255; *Woodworth v. Zimmerman*, 92 Ind. 349, and cases cited; *Ulrich v. Drischell*, 88 Ind. 354, and cases cited. In *McCaffrey v. Corrigan*, 49 Ind. 175, the rule we have stated was applied in a case very like the present.

Whether a judgment or decree is, or is not, erroneous, can not be inquired into in a collateral proceeding; all investi-

gation ends as soon as it is ascertained that there was jurisdiction of the subject and of the parties. It is, therefore, without success that the appellant's counsel presses upon our attention reasons supporting his contention that the decree mentioned in the answer is erroneous, for, grant that the record in the suit in which the decree was rendered abounds in errors, still it would profit the appellant nothing.

The third paragraph of the answer is not materially different from the second, and what we have said shows its sufficiency.

The material allegations of the second paragraph of the appellant's reply are these: That the mortgage was executed to Jackman on the 4th day of December, 1868, to indemnify him against any loss he might sustain as the surety of John R. Reeder; that the appellant did not appear and defend the suit brought to foreclose the mortgage because of the false and fraudulent representations of Jackman that the land was bought of Eli Reed by Reeder, and that the mortgage he was seeking to foreclose was given for the purchase-money, and that she relied upon such representations, and did not appear and defend the foreclosure suit.

If it were conceded that the appellant could impeach the decree rendered in the foreclosure suit in this collateral action, the reply can not be upheld. The statement of the plaintiff in the foreclosure suit is not shown to be false, much less fraudulent. As Jackman was surety for the purchase-money, and was compelled to pay it, he was subrogated to the rights of the original vendor, and his mortgage became, in equity, a mortgage for the purchase-money paid by him. *Smith v. Schneider*, 23 Mo. 447.

It is quite clear, upon the whole record, that the appellant can not maintain this action. This would be true, even if there had been no decree foreclosing the lien of Jackman, for, as Jackman paid the purchase-money, his right is superior to that of the appellant; and if she could, by any possibility, be awarded relief, it could only be upon a bill to re-

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deem. This is expressly decided in *Keith v. Hudson*, 74 Ind. 333, and the decision is fully supported by the cases of *McMahan v. Kimball*, 3 Blackf. 1; *Fisher v. Johnson*, 5 Ind. 492; *Talbott v. Armstrong*, 14 Ind. 254; *Patton v. Stewart*, 19 Ind. 233; *Alexander v. Herbert*, 60 Ind. 184.

If the fact that there was a decree of foreclosure should be entirely eliminated, still, this action could not be maintained, because the plaintiff has, at the utmost, no more than a right to redeem, for even if Jackman acquired no rights under his indemnifying mortgage paramount to those of the plaintiff, he had, nevertheless, a right by subrogation to the vendor's lien held by the person to whom the purchase-money was paid. As against a lien for purchase-money the rights of a widow are subordinate; for, until the purchase-money is paid, she has nothing more than a right to redeem.

Judgment affirmed.

Filed June 7, 1890; petition for a rehearing overruled Sept. 17, 1890.

No. 14,276.

## MCPHEETERS v. WRIGHT.

SCHOOL LAND.—*Purchase.—Forfeiture of Contract.—Re-Sale.—Outstanding Lien.—Tenants in Common.* A., the assignee of a certificate of purchase of school lands sold in compliance with section 4345, R. S. 1881, occupied the land until his death. At his death his children inherited the land as tenants in common, subject, by the terms of the will, to the widow's life-estate. The interest instalments remaining unpaid after the death of the widow, the land was resold under section 4347, R. S. 1881, and B. became the purchaser.

*Held*, that B., who was the owner, when the sale was made, of an undivided interest by purchase from one of the children, could not acquire title

124	560
125	177
124	560
143	476

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by purchase at such sale against the owner of an undivided interest by purchase from another of the children. *Eaton v. Piggott*, 94 Ind. 14, distinguished.

**SAME.—Forfeiture.—Effect of.—Surplus.**—A forfeiture, under section 4347, R. S. 1881, upon the failure of the purchaser of school lands to make payments, does not divest the title of the purchaser to the real estate, but simply authorizes the State to sell the real estate for its own reimbursement, the surplus going to the purchaser.

From the Noble Circuit Court.

*R. P. Barr*, for appellant.

*H. G. Zimmerman*, for appellee.

BERKSHIRE, C. J.—This is an action in ejectment. The appellee was the plaintiff and the appellant the defendant in the court below.

The appellant filed a cross-complaint, to which a demurrer was addressed, which was sustained by the court, and the appellant reserved an exception.

The main action having been put at issue the same was submitted to the court for trial, and after the evidence had been heard the court returned, at the request of the parties, a special finding.

The only alleged errors which we are called upon to consider are those which call in question the ruling of the court in sustaining the demurrer to the cross-complaint and its conclusions of law upon the facts found.

As our reasoning and conclusion as to the special finding are alike applicable to the action of the court in sustaining the demurrer to the cross-complaint, we will confine ourselves to the special finding.

After entitling the cause, the following is the special finding of the court:

“The court, having been by the plaintiff and defendant requested to find specially the facts and conclusions of law thereon in accordance with section 551 of the code of this State, finds specially the following facts:



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"1. That the lands described in the complaint, to wit, the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 16, township 33 north, of range 10 east, in Noble county, Indiana, were, on the 12th day of April, 1847, part of the congressional school lands of said township.

"2. That on the said day the said lands were, by the county auditor and the school commissioner of said county, duly and legally sold to one Adam Dingman; the former parcel for \$229 and the latter tract for \$160, and that at the time thereof the purchaser paid down \$57.25, being one-fourth of the purchase-money, and also paid \$12.02, one year's interest in advance.

"3. That on the last day named the auditor and school commissioner executed and delivered to said purchaser a certificate of purchase for each parcel separately, which certificates of purchase were, on the said 12th day of April, 1847, recorded by the auditor in book A of commissioner's record, on pages 555 and 556.

"4. That, on the 3d day of October, 1853, said purchaser assigned each of said certificates of purchase to one Nicholas Skeels, which assignment was duly acknowledged before the county auditor.

"5. That said instalments of annual interest on each parcel were paid by the said Dingman until the assignment in 1853, and then by the said Skeels until his decease, in the year 1854, each successively occupying and making valuable improvements on said land, and thereafter by Julia A. Skeels, the widow of said Nicholas Skeels, until the year 1867, when she died.

"6. The interest instalments on said purchase-money remained unpaid on the 5th day of April, 1883, for the years, to wit, 1877, 1878, 1879, 1880, 1881, 1882, 1883, the interest having been paid each year in advance up to and including April, 1876, the payment made in April, 1876, being for the year ending April, 1877.

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"7. That, on the 26th day of February, 1883, the said annual instalment of interest for said several years remaining unpaid, and certain portions of the principal being due and unpaid, the county auditor and county treasurer declared the original contract of purchase and sale forfeited, and immediately on said day caused said lands, and each parcel thereof, to be separately advertised for sale on the 5th day of April, 1883, at the court-house door, in Albion, said Noble county, by publishing notices of said sale, one notice for each of said parcels separately, duly signed by the auditor and treasurer, and published in the Weekly News, a newspaper of general circulation, printed and published in said county, for four successive weeks, the last of which publications was one week prior to the date of the sale, and that a copy of each notice of the sale of each parcel was also posted at the court-house door of said county four weeks and more prior to the day of sale, and also that a copy of each one of said notices of the sale was posted in three public places in Green township, said county of Noble, being the township in which said lands to be sold were situated.

"8. That the notice for the sale of the northwest one-fourth of the northeast one-fourth recited that there was due on the principal, \$51.75, on unpaid interest instalments, \$24.84, in all, \$76.59, to which was to be added all costs and damages at date of sale, and that the notice for the sale of the northeast one-fourth of the northwest one-fourth recited that the principal due thereon was \$120, unpaid interest, \$57.60, in all, \$177.60, to which were to be added costs and damages to day of sale.

"9. That on the day of sale, to wit: April 5th, 1883, there was due on the N. W. one-fourth of the N. E. one-fourth, the following: Amount of principal due, \$51.75, interest due, \$24.84, printer's fees, \$7.10, and treasurer's fees, \$2, five per cent. damages, \$3.82, sheriff's fees, \$2.80, certificate of purchase and recording same, \$3; total, \$95.21.

"10. That on the day of the sale there were due on the

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N. E. one-fourth of the N. W. one-fourth, the following amounts: Of principal due, \$120; interest due, \$57.60; printer's fees, \$6.75; auditor's and treasurer's fees, \$2; five per cent. damages, \$8.88; sheriff's fees, \$2.80; certificate of purchase and recording, \$3; total, \$201.03.

"11. That on the 15th day of April, 1883, in pursuance of said notice the county auditor sold the said N. W. one-fourth of the N. E. one-fourth of said section 16, at the courthouse door of Noble county, in the town of Albion, Noble county, Indiana, at public auction, to the plaintiff, John B. Wright, for \$700; and at the same time and place said auditor, in like manner, sold the N. E. one-fourth of said section to the plaintiff for \$800, the county treasurer attending thereat, and taking an account thereof.

"12. That on said purchase-money the purchaser, Wright, immediately upon such sale, paid down the sum of \$175 on the purchase of the N. W. one-fourth of the N. E. one-fourth, and the further sum of \$42 interest on the purchase-money in advance; and the said Wright also, upon the purchase of the N. E. one-fourth of the N. W. one-fourth immediately paid down the sum of \$200, and the further sum of \$48 interest in advance on the purchase-money.

"13. That immediately upon the sale and payment of the one-fourth of the purchase-money and interest, the county auditor and county treasurer executed and delivered to the plaintiff, as such purchaser, a certificate of purchase for the northwest quarter of the northeast quarter of said section, which was by the auditor duly recorded in commissioner's record book N, page 240, and also in like manner and at the same time, the said county auditor and county treasurer executed and delivered to said purchaser, Wright, a certificate of purchase for the northeast quarter of the northwest quarter of said section 16, which was by the county auditor recorded in commissioners' record, in book N, page 239.

"14. The court further finds that said Nicholas Skeels died about the year 1854, leaving surviving him several

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children by different wives; that the plaintiff's mother was the last wife of said Nicholas, by whom he had one child living at the decease of said Nicholas; that by the last will of said Nicholas Skeels, executed on the 18th day of May, 1854, and which will was, upon the 21st day of June, 1854, duly proven and admitted to probate in the office of the clerk of the common pleas court of said Noble county and duly recorded therein on pages 205 and 206 of the record of wills, he, the said Nicholas, devised the lands in the complaint described to his widow by the following provision therein contained, to wit: 'I give and bequeath to my beloved wife, Julia Ann Skeels, all my right, title and interest in the northeast quarter of the northwest quarter of section 16, and the northwest quarter of the northeast quarter of said section, both in town. 33 north, of range 10 east, in the county and State aforesaid, supposed to be eighty acres, for her own benefit during the term of her natural life, or so long as she remains my widow.'

" 15. That said Nicholas Skeels, at the time of his decease, was residing on said land, and after his decease his said widow, Julia Ann Skeels, with her daughter, who was then a minor and was the youngest of said children of said Nicholas Skeels, continued to reside on and occupy said premises, said widow residing thereon until her death, in 1867; that said daughter resided with her mother as a member of her family until after her majority, when she was married to one Abraham Schedule; that after her said marriage she and her husband resided on said premises and farmed the same for —, and the said Schedule paid the widow rent therefor; and that one of the sons of said Nicholas Skeels also for a time resided on said premises, farmed the same and paid the widow rent therefor; that said widow paid the taxes accruing on said land from the year 1854 to the year 1867, and paid the several instalments of interest accruing on said contract of purchase of April, 1847, up to her death, and that there

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is no other evidence as to whether or not she elected to take under the provisions of said will.

"17. That since the death of said Julia Ann Skeels, in 1867, the annual interest instalments on said original contract of purchase have been paid by the plaintiff up to and including the year 1876. '

"18. That on the 25th day of March, 1880, one Caleb Skeels, son and heir at law of said Nicholas Skeels, deceased, conveyed by quitclaim deed all his interest in said land to the defendant, said deed being recorded on the — day of —, 1880, in deed record 45, page 21, of the record of deeds of Noble county, Indiana, said conveyance being made in consummation and completion of an oral contract made April, 1879, between defendant and said Caleb, whereby in consideration of \$100 said Caleb agreed to convey to defendant his interest in said premises; and that under said oral contract defendant, on said — day of April, 1879, entered into possession of said premises, made improvements thereon of the value of \$300, and has ever since remained in possession of the same, claiming title to an interest therein under said deed.

"19. That on the 28th day of October, 1881, one Rebecca Jones, a daughter and heir at law of said Nicholas Skeels, conveyed by quitclaim deed to the plaintiff all her right, title and interest in said land, and that the plaintiff thereafter and up to the time of said auditor's sale of said land, on the — day of April, 1883, claimed a title and interest therein under said deed; but since he received said auditor's certificate of purchase at said sale, he has disclaimed any interest therein under said deed, and did not when this suit was commenced, and does not now claim any interest in said land, except under and by virtue of said auditor's sale.

"20. That on the 7th day of April, 1883, the defendant being in possession of the premises, claiming title as aforesaid, the plaintiff and defendant made an oral agreement by

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which it was agreed that the defendant should remain in possession of the house in which he was then living, on said premises, and the garden appurtenant thereto, situate in the southeast corner of said northeast quarter of the northwest quarter of section 16, township 33 north, of range 10 east, until September 1st, 1883, and the defendant then agreed to pay the plaintiff for the use of the same \$20, part to be paid in work; that at and prior to that time the plaintiff and defendant had and still have an unsettled account for work and labor performed; that thereafter, in the month of —, 1883, the defendant's minor son, by request of plaintiff and by direction of defendant, worked for him — days, nothing being at the time said by either plaintiff or defendant as to what the same should be applied on, nor has any application of said work to the payment of said \$20 been made by either party with the consent of the other; that defendant has ever since said April 7th, 1883, been in possession of said premises, claiming title thereto and refusing to surrender the same to the plaintiff as sole owner of the same under said purchase at said auditor's sale, but has never denied that the plaintiff had an interest therein in common with the defendant.

“21. The defendant is now in possession of said lands, claiming title to an interest therein by virtue of said purchase and said conveyance from said Caleb Skeels and not otherwise.”

“And thereupon the court finds and files the following conclusions of law, based upon said special finding of facts to wit: And the court upon the facts found as aforesaid, states as its conclusions of law:

“The plaintiff was, when this suit was commenced, and now is, the owner of all the lands described in the complaint, and of each tract; that the defendant is unlawfully in possession of the same, and wrongfully and unlawfully keeps plaintiff out of possession thereof, and that plaintiff is entitled to recover possession of said premises, with one dollar damages,

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and the costs of this action, and is entitled to have his title thereto quieted as against defendant."

Under the facts found there can be no question but that at the time of the sale made in April, 1883, and under which the appellee claims title, he and the appellant were tenants in common of the real estate in question.

Not that the appellee acquired any title to the real estate by inheritance from his mother, for the court could well conclude from the facts found that the widow, Julia Ann Skeels, elected to take under the will of her husband, and at the time of her death was only a life tenant.

From the facts stated we must come to the conclusion that Nicholas Skeels died intestate, except so far as he made provision for his said widow. He died, leaving his said widow and eleven children; subject to the widow's life-estate, his said children inherited as tenants in common the said real estate, the interest of each being equal to an undivided one-eleventh thereof.

At the time of the sale through which appellee claims title he was the owner of an undivided one-eleventh of said real estate by purchase and conveyance from one of the children of said decedent, and the appellant was the owner of an undivided one-eleventh of said real estate by purchase and conveyance from one of said children.

Not only were the appellee and appellants tenants in common as to said real estate, but they held title from one common source, to wit, Nicholas Skeels.

The question, therefore, which must rule our conclusion is, could the appellee acquire title by purchase at the auditor and treasurer's sale as against his co-tenant in common?

In our judgment he could not. This case may readily be distinguished from the case of *Elston v. Piggott*, 94 Ind. 14, which is relied upon by counsel for the appellee, and which no doubt influenced the conclusion reached by the court below.

We quote the following from the opinion in that case,

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which may be found beginning at the bottom of page 25: "Appellee's counsel contend that the appellant is precluded from asserting title under the foreclosure sale, because he was, as they affirm, a tenant in common with Martha J. Piggott, and could not, therefore, buy in an outstanding lien and build a title upon it. The general rule unquestionably is, that one tenant in common can not, by purchasing an outstanding lien, acquire a title which will evict his co-tenant. This rule, however, is subject to many exceptions and obtains only where the relation of tenants in common exists in strictness, and where the relation is such as to require mutual trust and confidence. It is impossible to perceive how one who buys at a sale made by an assignee in bankruptcy of the husband's interest becomes charged in such a case as that embraced in our general question, with duties of trust and confidence to the wife of the bankrupt. The title is not a common one; the interests are not reciprocal, and there is no fiduciary relationship created. The title is secured by virtue of a judicial sale, and not by the same instrument, nor from the same source, as that from which the wife's claim is derived. \* \* \* It is not to be forgotten that the wife was bound both by the decree and the mortgage, and the case is, therefore, altogether different from one where the lien is created by the act of the law, as for taxes, or *where the encumbrance was created by a former owner through whom both parties claim title. In such case the burden is a common one. In the present case the burden rests alone on one of the tenants.*"

That part of the quotation which we have underscored covers just the case we have under consideration.

In this case the encumbrance, because of which the sale was made, and at which the appellee became the purchaser, was "created by a former owner through whom both parties claim title."

In 3 Sharswood & Budd Lead. Cases, American Law of Real Prop., following the head note, there is a learned discus-



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sion under the "Rule that purchase of outstanding title by one co-tenant enures to the common benefit." Page 89 *et seq.*

The authors say: "An important result of the intimate relations existing between tenants in common, is that one will not be permitted to purchase and set up against his co-tenants an outstanding title, and from this it follows that, generally speaking, if one tenant in common take from a third person a conveyance of any title to an estate in the property held in common, such conveyance will enure to the benefit of all the tenants."

The following authorities are cited: *Van Horne v. Fonda*, 5 Johns. Ch. 409; *Ligget v. Bechtol*, 1 P. & W. 440; *Weaver v. Wible*, 25 Pa. St. 270; *Keller v. Auble*, 58 Pa. St. 410; *Lloyd v. Lynch*, 28 Pa. St. 419; *Knolls v. Barnhart*, 71 N. Y. 474; *Jones v. Stanton*, 11 Mo. 433; *Buchanan v. King's Heirs*, 22 Gratt. 414; *Titsworth v. Stout*, 49 Ill. 78; *Montague v. Selb*, 106 Ill. 49; *Bracken v. Cooper*, 80 Ill. 221; *Rothwell v. Dewees*, 2 Black, (U. S.) 619; *Lee v. Fox*, 6 Dana, 171; *King v. Rowan*, 10 Heisk. 675; *Tisdale v. Tisdale*, 2 Sneed, 596; *Brown v. Haman*, 1 Neb. 448; *Mandeville v. Solomon*, 39 Cal. 125; *House v. Fuller*, 13 Vt. 165; *Shell v. Walker*, 54 Iowa, 386; *Dillinger v. Kelley*, 84 Mo. 561.

We also cite the following additional authorities: 2 Story Eq., sec. 1211; 4 Kent Com. (12 ed.), p. 371 and note; *Brittin v. Handy*, 20 Ark. 381; *Venable v. Beauchamp*, 3 Dana, 321 (28 Am. Dec. 74).

In a note to this case by the annotator it is said: "It is a well established principle in equity, that a person placed in a situation of trust or confidence with respect to the subject of a purchase, can not retain such purchase for his exclusive benefit. This is a general principle, applying to all persons who come within the rule that no party can be permitted to purchase an interest where he has a duty to perform inconsistent with the character of a purchaser. Joint tenants,

parceners, and tenants in common are within this principle, and, therefore a joint tenant, co-parcener, or tenant in common is not permitted to purchase in an outstanding title or encumbrance for his own exclusive benefit, or to set up such title as against his co-tenant. But such purchase will enure to the joint benefit of all co-tenants, upon their contributing to the expense of it, in proportion to their respective interests." See *Moon v. Jennings*, 119 Ind. 130.

A number of the authorities cited above are cited, and the following additional: *Swinburne v. Swinburne*, 28 N. Y. 568; *Picot v. Page*, 26 Mo. 398; *Duff v. Wilson*, 72 Pa. St. 442; *Davis v. King*, 87 Pa. St. 261; *Sullivan v. McLennans*, 2 Clarke (Iowa), 437; *Thruston v. Masterson*, 9 Dana, 228; *Gossom v. Donaldson*, 18 B. Mon. 230; *Funk v. Newcomer*, 10 Md. 301; *Flagg v. Mann*, 2 Sumn. 486; *Freeman Cot. and Part.*, section 154; 1 Hill Real Prop. 815; 1 Washburn Real Prop. 430.

In *Van Horne v. Fonda*, *supra*, Chancellor Kent said: "I will not say, however, that one tenant in common may not, in any case, purchase in an outstanding title for his exclusive benefit. But when two devisees are in possession, under an imperfect title, derived from their common ancestor, there would seem naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out upon a common subject, by one of the owners, in which all are entitled to the common benefit, on bearing a due portion of the expense. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice. It would be immoral, because it would be against

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the reciprocal obligation to do nothing to the prejudice of each other's equal claim, which the relationship of the parties, as joint devisees, created. Community of interest produces a community of duty, and there is no real difference, on the ground of policy and justice, whether one co-tenant buys up an outstanding encumbrance or an adverse title to disseize and expel his co-tenant. It can not be tolerated, when applied to a common subject in which the parties had equal concern, and which created a mutual obligation, to deal candidly and benevolently with each other, and to cause no harm to their joint interests."

The rule must be the same when applied to joint heirs as to joint devisees, and as the appellee and the appellant had each purchased from the heirs their position is the same as though their controversy was between the heirs themselves.

In 11 American and English Encyclopædia of Law, page 1082, under the head of "Joint Tenants," it is said: "*Purchase of Outstanding Titles*. The general rule is that a co-tenant's purchase of an outstanding title enures to the benefit of all, whether the several interests of the different tenants accrue under the same instrument, under different instruments, or by acts of law, and in some States this rule seems to apply, however the tenancy may have been formed, whatever the relation of the co-tenants with each other may have been, and from whatever source the outstanding title may have been acquired." In addition to the authorities cited already, the following are cited: *Clements v. Cates*, 49 Ark. 242; *Olney v. Sawyer*, 54 Cal. 379; *Boskowitz v. Davis*, 12 Nev. 446; *Grimm v. Wicker*, 80 N. C. 343; *Threadgill v. Redwine*, 97 N. C. 241; *Page v. Branch*, 97 N. C. 97; *Braintree v. Bottles*, 6 Vt. 395; *Rountree v. Deuson*, 59 Wis. 522. As supporting the second proposition, *Lloyd v. Lynch*, 28 Pa. St. 419; *Gossom v. Donaldson*, *supra*.

We quote further from the authority above: "But in other States this rule applies only when tenants stand in

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some confidential relation in regard to one another's interest, so that it would be inequitable to permit one to acquire a title solely for his own benefit, in which case he will be treated as a trustee for the share of his co-tenants, but persons acquiring unconnected interests in the same subject are not, it appears, bound to any greater protection of one another's interests than would be required of strangers." To support the rule as last stated, *Roberts v. Thorn*, 25 Texas, 728, *Brittin v. Handy*, *supra*, *King v. Rowan*, *supra*, *Fentz v. Klotzsch*, 28 Wis. 312, and *Buchanan v. King's Heirs*, *supra*, are cited. Our own State is in accord with the general rule. *Wilson v. Peelle*, 78 Ind. 384; *Bender v. Stewart*, 75 Ind. 88; *Elaton v. Piggott*, *supra*. But see further upon this subject, 11 Am. and Eng. Encyc. of Law, page 1083, *et seq.*, and notes.

In a note to the leading case of *Keech v. Sandford*, 1 Leading Cases in Equity, W. & T. 44, it is said: "But tenants in common, probably, are subject to this mutual obligation, only where their interest accrues under the same instrument, or act of the parties or of the law, or where they have entered into some engagement or understanding with one another; for persons acquiring unconnected interests in the same subject by distinct purchases, though it may be under the same title, are probably not bound to any greater protection of one another's interests, than would be required between strangers." The only case cited to support this note is *Matthews v. Bliss*, 22 Pick. 48.

The case is not an authority in support of the position assumed. The rights of tenants in common holding title under the same or different instruments were not even remotely involved in that case. SHAW, C. J., delivered the opinion of the court. He said: "Most of the principles and rules applicable to the case of procuring money on goods by false and fraudulent pretences, and of avoiding and vacating contracts obtained by false representations, are applicable to this case. The gist of the action was the conspiracy of the three

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defendants after having agreed upon a sale of the brig at a large price, to induce the plaintiff's agent, by a concealment of the fact that the vessel could be sold for such price, and by false and fraudulent representations, to sell the plaintiff's quarter part of the vessel, at a price much below that which they had so agreed to sell for. The court are of the opinion that the direction of the judge who tried the cause was correct in stating to the jury that the mere non-disclosure of the fact, within their own knowledge, that they could sell and had agreed to sell the brig for a higher price, would not be sufficient to support the action, and that they were under no legal obligation to disclose the fact, and that withholding it was not such a fraudulent concealment of the truth, as would of itself maintain the action. The court are of the opinion, that the tenants in common of a vessel, who are not engaged jointly in the employment of purchasing or building ships for sale, do not stand in such a relation of mutual trust and confidence towards each other, in respect of the sale of such vessel, that each is bound, in his dealings with the other, to communicate all the information of facts within his knowledge, which may affect the price or value. A different rule may prevail in respect to any contract for the use or employment of the common property, in which relation perhaps they may be deemed to place confidence mutually in each other. But as in common cases of tenants in common of a vessel, they are independent of each other in all matters of purchase and sale, and may deal with each other in the same manner as owners of separate property."

The case in its facts and in the conclusion reached by the court, is just as far away from the doctrine which it is cited to support as it well could be.

In *Roberts v. Thorn*, 25 Texas, 728, the note, *supra*, is quoted and followed, and the case of *Smiley v. Dixon*, 1 R. P. & W. 339, cited in support of the conclusion of the court. But that case seems to be as far away from the question be-

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fore the court in *Roberts v. Thorn*, *supra*, as was *Matthews v. Bliss*, *supra*, from the text which it was cited to support.

We quote again 3 Leading Cases, on Real Property, at page 91, as giving the author's opinion as to what was decided in *Smiley v. Dixon*, *supra*, including a quotation therefrom: "It is manifest that here there was no tenancy in common, for each purchaser bought a certain number of acres, which were set off, and not an undivided interest or share, and upon this ground the court went. HUSTON, J., in delivering the opinion of the court, said, after recognizing the general rule: 'In this case, these men did not purchase jointly, neither had anything by purchase from Maxwell; they were not joint tenants nor tenants in common, and there was no priority between them. The bare fact that each had been cheated neither gave any right to the other, nor deprived him of the full and absolute right to purchase from the real owner when discovered. The State was the real owner, and Smiley purchased from the State by his actual settlement.'"  
*Roberts v. Thorn*, *supra*, was afterwards cited with approval in *Rippetoe v. Dwyer*, 49 Texas, 498.

In *King v. Rowan*, *supra*, it was held that there were two exceptions to the general rule as declared in *Van Horne v. Fonda*, *supra* (we quote from note to *Venable v. Beauchamp*, *supra*):

"1. Where facts wholly inconsistent with a trust are clearly made to appear.

"2. Where all the parties hold by the purchase of different titles, even though all come from a common source."

In addition to the fact that the cases last above are not sustained by the authorities on which they assume to rest, they attempt to draw a distinction where there seems to be no solid reason for a difference, and are out of line with all of the authorities. See *Rothwell v. Dewees*, *supra*; *Bracken v. Cooper*, *supra*; *Montague v. Selb*, *supra*; 3 Leading Cases Real Property, 92: note to *Venable v. Beauchamp*, *supra*.

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It may be said of the case of *Brittin v. Handy*, *supra*, that that was a case where the co-tenant's interest was sold on execution against him alone.

But it is claimed that as there had been a forfeiture of the contract, as provided in section 4347, R. S. 1881, the title was in the State, and not in the heirs of Nicholas Skeels, or their grantees, and therefore the purchase at the auditor and treasurer's sale was not a purchase of the interest of a co-tenant to the real estate. Had the appellant's title been divested by virtue of the section of the statute *supra*, the point would be well made. *Watkins v. Eaton*, 30 Me. 529 (50 Am. Dec. 637, 641); *Hurley v. Hurley*, 148 Mass. 444; *Reinboth v. Zerbe Run, etc., Co.*, 29 Pa. St. 139; *Freeman Cot. and Part.*, section 159; *Lewis v. Robinson*, 10 Watts, 354; *Kirkpatrick v. Mathiot*, 4 Watts & S. 251; *Coleman v. Coleman*, 3 Dana, 398.

But we do not construe a forfeiture under section 4347 as having an effect to divest the title of the purchaser to the real estate, but simply to authorize the State to sell the real estate for its own reimbursement.

This is evident from the fact that it is provided that in case the real estate shall sell for more than a sum sufficient to pay the sum owing therefor, with interest and costs, and five per cent. damages, the residue when collected shall be paid over to the purchaser, or his legal representative.

If, when the contract is forfeited, the title vests in the State absolutely, there could be no reason why the surplus, after principal, interest, costs, and damages are paid, should go to the purchaser; it should fall back into the county treasury for the benefit of the school fund.

But it makes no difference how much the land brings, though the surplus be largely in excess of what the purchaser has paid out, he is entitled to it all.

The word "revert," employed in the statute, and as used in the law, simply means to return. *Sweet's Law Dictionary*.

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Worcester's definition is: "To fall back into the possession of the donor, or of the former proprietor."

Webster has it: "To return to the proprietor, after the determination of a particular estate granted by him."

The real estate returns to, or falls back into the possession of, the State, to be disposed of for the benefit of the school fund, and the mortgagor, or his grantee as well, to be converted into money; and after sale the proceeds to be distributed as we have already indicated.

As against the holder of the legal title the State can not withhold the land from sale, and thus deprive him of the surplus which may arise from the sale.

We are of the opinion that the court erred in its conclusions of law, and in overruling the demurrer to the cross-complaint.

What the effect may be if the appellant should fail to do equity within a proper time, we are not now called on to decide.

Judgment reversed, with costs, with directions to the court below to grant a new trial.

Filed May 28, 1890; petition for a rehearing overruled Sept. 17, 1890.

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 No. 15,404.

**KINCAID v. THE INDIANAPOLIS NATURAL GAS COMPANY  
ET AL.**

**EMINENT DOMAIN.**—*Public Highway.*—*Appropriation.*—*Compensation of Abutting Owner.*—The owner of land abutting on a public highway has a special private interest in the land upon which the highway is located which can not be appropriated without compensation.

**SAME.**—*County Commissioners.*—*License to Natural Gas Company to Lay Pipes.*—*Private Property Rights.*—A license granted by the board of commission-

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ers to a gas company to lay a line of pipes in a public highway is effectual to convey the right of the county to such highway, but it does not affect private property rights.

**SAME.**—*Highway.—Use for Other than Highway Purposes.—Additional Burden.*—The appropriation of land for a rural highway entitles the local officers to use it only for highway purposes. A use for any other than a legitimate highway purpose is a taking, within the meaning of the Constitution, since it imposes an additional burden upon the land.

**SAME.**—*Laying Gas Pipes.*—The laying of gas pipes in a suburban road is the imposition of an additional burden, and compensation must be made to the abutting owner.

**SAME.**—*Public Policy.—Injunction.—Damages.*—Where a gas company, on the faith of a license from the board of commissioners, expends large sums of money in laying its line of pipe in a public highway, and a large number of citizens acquire rights upon the faith of the successful prosecution of the enterprise, an abutting owner who, with knowledge of the facts, stands by without objection until the completion of the main line and system, can not interfere by injunction to the serious impairment of the rights of the company and the public, but must seek his remedy at law, in an action for damages.

From the Hamilton Circuit Court.

*J. A. New, S. E. Urmston, R. R. Stephenson and W. R. Fertig*, for appellant.

*A. F. Shirts, M. Vestal, T. J. Kane and T. P. Davis*, for appellees.

**ELLIOTT, J.**—The board of commissioners of Hamilton county granted the Indianapolis Natural Gas Company the right to lay pipes in a free gravel road constructed under the statute of this State at the expense of the land-owners. The appellant is an abutting owner in fee of land along the line of the highway. Prior to the time this suit was brought the company had constructed a system of gas-works, and had laid in the highway a line of pipes for the purpose of supplying the citizens of the city of Indianapolis and others with natural gas. In the prosecution of this work the company had expended many thousands of dollars. To make the system effective, and to successfully supply gas, as it had undertaken to do, it became necessary for the company to extend its line of pipes so as to connect its main line and

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system with additional gas wells which it had drilled and of which it was the owner. This it was undertaking to do at the time the appellant sued out the injunction issued in this case. The trial court dissolved the temporary injunction, and refused to grant a perpetual injunction. From this judgment the appellant prosecutes his appeal.

The license granted by the board of commissioners was effectual to convey the right of the county, such as it had, in the highway, but it did not affect private property rights. *Burkam v. Ohio, etc., R. W. Co.*, 122 Ind. 344.

The owner of the fee in a suburban highway has a special proprietary right distinct from that of the public, and this right can not be taken without compensation. In a case decided in 1855 it was held that abutters have a private right distinct from that of the public, which even the Legislature can not take away except to appropriate to a public use upon payment of compensation. *Common Council, etc., v. Groas*, 7 Ind. 9. This doctrine has been steadily adhered to by this court. *Haynes v. Thomas*, 7 Ind. 38; *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178; *Pettis v. Johnson*, 56 Ind. 139; *State v. Berdetta*, 73 Ind. 185; *Ross v. Thompson*, 78 Ind. 90; *Cummins v. City of Seymour*, 79 Ind. 491; *City of Logansport v. Shirk*, 88 Ind. 563; *City of Indianapolis v. Kingsbury*, 101 Ind. 200 (211); *Terre Haute, etc., R. R. Co. v. Bissell*, 108 Ind. 113; *Town of Rensselaer v. Leopold*, 106 Ind. 29; *City of Lafayette v. Nagle*, 113 Ind. 425.

The rule declared by our own cases is in harmony with the very ancient and well settled rule that the public acquires, except in cases where the seizure of the fee is authorized, nothing more than a right to pass and repass, and the great weight of authority sustains the doctrine laid down by our decisions.

There is an essential distinction between urban and suburban highways, and the rights of abutters are much more limited in the case of urban streets than they are in the case of suburban ways. We note the distinction between the

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classes of public ways, and declare that the servitude in the one class is much broader than it is in the other, but it is not necessary to here mark with particularity the difference between the two classes of public ways, for we are here concerned only with suburban ways.

Subject to the right of the public the owner of the fee of a rural road retains all right and interest in it. He remains the owner, and, as such, his rights are very comprehensive. *Brookville, etc., Co. v. Butler*, 91 Ind. 134; *Shelbyville, etc., T. P. Co. v. Green*, 99 Ind. 205; *Dovaston v. Payne*, 2 H. Bl. 527; *Peck v. Smith*, 1 Conn. 103; *Trustees, etc., Society v. Auburn, etc., R. R. Co.*, 3 Hill, 567.

That the appellant has a special private interest in the land upon which the highway is located, which can not be taken from him without compensation, is quite clear upon principle and authority.

The appropriation of the land for a rural highway did not entitle the local officers to use it for any other than highway purposes, although they did acquire a right to use it for all purposes legitimately connected with the local system of highways. A use for any other than a legitimate highway purpose is a taking within the meaning of the Constitution, inasmuch as it imposes an additional burden upon the land, and whenever land is subjected to an additional burden the owner is entitled to compensation. The authorities, although not very numerous, are harmonious upon the proposition that laying gas pipes in a suburban road is the imposition of an additional burden, and that compensation must be made to the owner. *Bloomfield, etc., Co. v. Calkins*, 62 N. Y. 386; *Bloomfield, etc., Co. v. Calkins*, 1 T. & C. (N. Y.) 549; *Bloomfield, etc., Co. v. Richardson*, 63 Barb. 437; *Sterling's Appeal*, 116 Pa. St. 35; *Webb v. Ohio Gas Fuel Co.*, 16 Weekly L. Bulletin, 121.

The same principle is declared in the cases which hold that drainage pipes can not be laid in rural highways except for public drainage purposes connected with the system of high-

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ways. *Murray v. Gibson*, 21 Ill. App. Ct. 488; *Indiana, etc., R. R. Co. v. Hartley*, 67 Ill. 439; *Board of Trade, etc., Co. v. Barnett*, 107 Ill. 507. The cases to which we have referred are well reasoned and are founded on solid principle. We have no hesitation in concluding that the laying of the pipes in the highway was a taking of the appellant's property within the meaning of the Constitution, and that he is entitled to compensation.

It does not follow, however, that a land-owner entitled to compensation for property appropriated to a public use can always maintain injunction. It remains, therefore, to inquire and decide whether the appellant can maintain this suit, for if he is not entitled to an injunction he can not succeed.

The use to which the line of the highway was appropriated was a public one. There can be no doubt that the work of supplying cities with natural gas is a public one for which property may be appropriated under the right of eminent domain. *State, ex rel., v. Indiana, etc., Mining Co.*, 120 Ind. 575; *Carothers v. Philadelphia Co.*, 118 Pa. St. 468; *Pennsylvania Natural Gas Co. v. Cook*, 123 Pa. St. 170; *Johnston's Appeal*, 7 Atl. R. 167.

There was an assertion of a right to use the highway and the gas company had expended large sums of money on the faith of the license granted to it by the board of commissioners. It had assumed to use the highway for a public purpose, and many citizens had acquired rights upon the faith of the successful and effective prosecution and conduct of the work and business undertaken by the company. The appellant, with knowledge of the facts, made no objection until the completion of the main line and system, but delayed until they had been completed and then asked an injunction. To grant the relief he seeks will, it is clearly inferable, seriously impair the rights of the public as well as those of the gas company. We are satisfied that upon the case made by the evidence, the appellant is not entitled

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to an injunction. In adjudging that he has no right to an injunction, we do not hold that he may not, in a proper case, recover damages for the invasion of his legal rights. What we here decide is, that the case made is not one justifying resort to the extraordinary remedy of injunction. The effect of our decision is that he has mistaken his remedy.

The work in which the gas company is engaged is one in which the general community have an interest, and to arrest the work by injunction would do great injury to many citizens. Persons other than the company have an interest, and they are so numerous that it is the duty of the courts to protect that interest where it can be done without materially impairing the rights of any private citizen, and that can be done in this instance, for the appellant, in the appropriate action and upon making a proper case, can be fully compensated in damages for all injury that he may have suffered. There is present here an element of public policy which exerts a controlling influence. The good of the community forbids that one who occupies such a position as the appellant does should be permitted to arrest work essential to the successful discharge of the company's duty to supply the community with fuel in the form of natural gas. Public policy, as has been demonstrated in analogous cases, requires that the rights of the community should be protected, and the land-owner left to his remedy at law. *Louisville, etc., R. W. Co. v. Beck*, 119 Ind. 124; *Louisville, etc., R. W. Co. v. Soltwedde*, 116 Ind. 257; *Bravard v. Cincinnati, etc., R. R. Co.*, 115 Ind. 1; *Sherlock v. Louisville, etc., R. W. Co.*, 115 Ind. 22; *Midland R. W. Co. v. Smith*, 113 Ind. 233; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581. Nor does this rule operate unjustly, for the land-owner is not deprived of compensation; on the contrary, the right to compensation is left open to him and it is his own fault if he does not recover full compensation for all the loss he has actually sustained. Blended with the element of public policy is another influential one, and that is this: The appellant without

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objection knowingly permitted the work to proceed until it reached a stage at which it would be ruinous to the company which had invested such large sums of money to stop it by injunction. These two elements, in their combined strength, certainly make a case in which an injunction should, upon plain principles of equity, be denied. *City of Logansport v. Uhl*, 99 Ind. 531 (544); *Dodge v. Pennsylvania R. R. Co.*, 36 Am. & Eng. R. R. Cases, 180.

Judgment affirmed.

Filed June 25, 1890; petition for a rehearing overruled Sept. 17, 1890.

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No. 15,407.

POOLE v. MCGAHAN.

**EVIDENCE.**—*Admission of without Objection.*—Where evidence is admitted without objection error can not be predicated upon such admission.

From the Marion Circuit Court.

*R. Hill, M. S. Bright and G. W. Spahr*, for appellant.

*C. P. Jacobs and J. P. Baker*, for appellee.

**BERKSHIRE, J.**—This is an action to declare and enforce a parol trust to certain letters patent issued to one John S. Smith. The complaint alleges that the patentee assigned the said letters patent to the appellee and that he assigned the same to the appellant; that the assignment, though absolute upon its face, was without consideration and in trust.

There was no demurrer filed to the complaint, and the answer was but the general denial.

The court tried the cause without a jury and returned a finding for the appellee.

The appellant filed a motion for a new trial, which was

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overruled by the court and he reserved an exception and judgment was rendered in accordance with the finding.

The only specification in the assignment of error which is available to the appellant is the second—error of the court in overruling the motion for a new trial.

The only reason found in the motion which presents any question for us to consider is the first—the finding of the court is not supported by the evidence.

The appellee's argument relates to the fourth cause found in the motion—error of the court in allowing the appellee to introduce parol evidence to prove the alleged parol trust. But no question is presented by this reason, because the admitted evidence was not objected to on the trial. *Judd v. Small*, 107 Ind. 398; *Stockwell v. State, ex rel.*, 101 Ind. 1; *City of Evansville v. Martin*, 103 Ind. 206; *McFadden v. Fritz*, 110 Ind. 1; *Compton v. Ivey*, 59 Ind. 352.

If the evidence was incompetent it was because of its quality and not that it did not tend to prove the facts alleged in the complaint. The evidence having been admitted without objection, it was before the court for its consideration.

We have examined the evidence and find that it supports the finding.

There is no error in the record.

Judgment affirmed, with costs.

Filed May 17, 1890; petition for a rehearing overruled Sept. 18, 1890.

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 No. 14,128.

### NYSEWANDER v. LOWMAN.

**PLEADING.**—*Notice by Publication.*—*General Appearance.*—*Amended Complaint.*—Where a defendant, who has been notified by publication, enters a general appearance, the trial court may permit the filing of an

124	584
125	79
124	584
131	169
131	401
132	204
133	109
124	584
146	585
124	584
148	235
148	368

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amended complaint which relates to the same transaction and sets up substantially the same facts embraced in the original complaint.

**SAME.—Appearance.—Due Process of Law.**—Where a notice, whatever its character, brings a defendant into court, secures an appearance and gives an adequate opportunity to the defendant to be heard, there is due process of law, and objections are unavailing.

**SAME.—Action for Damages.—Fraudulent Representations as to Value of Stock.—Complaint.—Sufficiency of Against Demurrer.**—A complaint alleged that the plaintiff exchanged land with the defendant for shares of the capital stock of a corporation of which the defendant was president; that the defendant knew the financial condition of the corporation and the value of its capital stock; that for the purpose of defrauding the plaintiff, and to induce him to accept the stock, the defendant represented that the financial condition of the corporation was good, and that its capital stock was of par value; that for the purpose of preventing the plaintiff from ascertaining the condition of the corporation and the value of its capital stock, the defendant fraudulently requested the plaintiff to make no inquiries as to the financial condition of the company, or as to the value of its capital stock, for the reason that he did not want other stockholders to know that he was selling his stock; that the plaintiff, relying upon the representations of the defendant, exchanged his land for the stock; that the defendant knew at the time of making the representations that the corporation was insolvent and its capital stock worthless.

**Held**, that the complaint states a cause of action for damages caused by fraudulent representations, and is good against demurrer.

**SAME.—Measure of Damages.—Complaint.**—The measure of damages is the difference between the actual value of the corporate stock and its value had it been as represented by the defendant, and not the value of the land exchanged for the stock; and hence the complaint is not bad for failing to state specifically the value of the land exchanged for the stock.

**SAME.—Facts Plead by way of Recital.—Demurrer.**—Facts must be pleaded directly and positively, and it avails nothing as against a demurrer to plead them by way of recital.

**CONTRACT.—Rescission.—Retention of Goods.—Damages.**—While a party can not sue for the rescission of a contract while retaining the goods received under it, he may retain the goods and maintain an action for damages for fraudulent representations.

**SAME.—Rescission.—Election of Remedies.—Amendment of Complaint.**—Where no election of remedies is compelled by the adverse party, and nothing more is done than to file a complaint for rescission, and in the same proceeding so amend it as to make it a complaint for damages, there is no such act or conduct as concludes the plaintiff.

**VENDOR AND PURCHASER.—Fraud on Part of Vendee.—Vendor's Lien.**—Where a vendee fraudulently induces a vendor to accept in payment of



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the purchase-money property that is worthless or of less value than that represented, the lien is not waived.

From the Jay Circuit Court.

*S. W. Haynes, W. E. Cox, J. W. Headington, J. J. M. La Follette*, for appellant.

*D. T. Taylor, R. H. Hartford, J. B. Jaqua and J. A. Jaqua*, for appellee.

ELLIOTT, J.—The appellee filed a complaint against the appellant, and caused notice to be given him by publication. At the time fixed by the notice the appellant appeared by counsel and filed an application for a change of judges, and his application was granted. After the appearance thus entered the appellee filed an amended complaint, different in some material respects from the original, but based upon the same transaction, setting forth substantially the same facts and relating to the same real estate. In various modes the appellant objected to the filing of the amended complaint, and challenged the right of the court to compel an answer. We are satisfied that there was no error in any of the rulings of the trial court upon this subject.

The appellant, by his general appearance, was in court for all legitimate purposes, and, both by our code and under our decisions, it was within the discretion of the trial court to permit the filing of an amended complaint, and this was all that was done in this instance, for the complaint, as amended, related to the transaction and property embraced in the original pleading. There was no substitution of an independent transaction for a radically different one.

It is well settled that the trial court has a wide discretion in the matter of amendments, and unless it clearly appears that there was an abuse of discretion this court will not interfere.

The notice by publication was such as the law requires, and it is a valid notice. *Quarl v. Abbett*, 102 Ind. 233. In this instance it accomplished all that a personal notice by the

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service of a summons could possibly do, for it brought the defendant into court, and gave him full opportunity to litigate the legal controversy. Where a notice, whatever its character, brings a defendant into court, secures an appearance, and gives an adequate opportunity to the defendant to be heard, there is due process of law, and objections are unavailing.

The complaint alleges that the plaintiff exchanged a tract of land with the defendant for forty-three shares of the capital stock of a corporation known as the Superior Manufacturing Company; that the defendant was, at the time, and long had been, the president of the corporation, which was located and engaged in business at the town of New Carlisle, in the State of Ohio; that he knew the financial condition of the corporation and the value of its capital stock; that for the purpose of defrauding the plaintiff, and to induce him to accept the stock, the defendant represented that the corporation was in a good financial condition, and that its capital stock was of par value; that for the purpose of preventing the plaintiff from ascertaining the condition of the corporation, and the value of its capital stock, the defendant fraudulently requested the plaintiff to make no inquiries as to the financial condition of the company, or as to the value of its capital stock, for the reason that he did not want other stockholders to know that he was selling his stock; that the plaintiff, having no knowledge of the financial condition of the corporation or of the value of its capital stock, relied upon the representations of the defendant; that the corporation was insolvent, and its capital stock worthless; that the defendant, at the time he made such representations, knew that they were false, that the corporation was insolvent, and its capital stock worthless; that the plaintiff, relying upon the representations of the defendant, exchanged his land for the stock.

The complaint states facts entitling the plaintiff to some relief, and such a complaint will repel a demurrer. *Bayless*

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v. *Glenn*, 72 Ind. 5. If it were conceded that the facts stated do not entitle the plaintiff to a vendor's lien it would not avail the defendant, for as the complaint states a cause of action for damages, caused by fraudulent representations, a demurrer will not prevail against it.

We have assumed that the complaint shows that the fraud of the defendant entitles the plaintiff to damages if it does no more, and we are clear that this assumption is well grounded, for the complaint shows that false representations of a material character were knowingly made, and that the defendant resorted to an artifice to deceive and defraud the plaintiff, and such a tort gives the wronged party a cause of action. The case of *Cookerly v. Johnson*, 33 Ind. 151, is not in point, for in that case the plaintiff sought a rescission of a contract and yet clung to part of the property he had received in exchange, while here, the property which the plaintiff retains is averred to be worthless. But a party may retain property and sue for damages caused by fraudulent representations. This doctrine is as well established as any within the whole range of the law. *Johnson v. Culver*, 116 Ind. 278 (285); *St. John v. Hendrickson*, 81 Ind. 350; *Burnham v. Mitchell*, 34 Wis. 116; *Parker v. Marquis*, 64 Mo. 38; *Nauman v. Oberle*, 90 Mo. 666; *Whitney v. Allaire*, 4 Denio, 554; *Grabenheimer v. Blum*, 63 Texas, 369.

A party who suffers injury by the fraud of another may, however, waive his right to damages. *St. John v. Hendrickson*, *supra*; Cooley Torts, 505. But a mere affirmation of the contract by retaining the property received under it does not bar an action for damages although it may defeat a suit for rescission. *Johnson v. Culver*, *supra*; *McQueen v. State Bank, etc.*, 2 Ind. 413; *Campbell v. Fleming*, 1 Ad. & E. 40. Mr. Bigelow seems to carry the doctrine to the extent of holding that in no event can a claim for damages caused by a fraud be waived. Law of Fraud, 69. But, as shown by Judge Cooley, and by the authorities he cites, Mr. Bigelow's

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position is untenable. Cooley Torts, 505, and authorities, cited in note.

The appellant's counsel mistake the point in dispute, and, instead of proving that the plaintiff can not recover damages, prove that he can not rescind the contract. Their arguments and their authorities are entirely without weight because they are totally irrelevant.

The measure of damages in such a case as this is the difference between the actual value of the corporate stock and its value had the facts been as represented by the defendant. *Booher v. Goldsborough*, 44 Ind. 490; *Morse v. Hutchins*, 102 Mass. 439; *Stiles v. White*, 11 Met. 356; *Noyes v. Blodgett*, 58 N. H. 502. We do not hold, nor mean to hold, that the amount of damages is to be determined solely from the statements of the defendant as to the value of the stock, for it is unnecessary at this point to decide just how the damages shall be measured; it is enough to say that the measure of damages is not the value of the land exchanged for the stock. *Bowman v. Parker*, 40 Vt. 410; *Hubbell v. Meigs*, 50 N. Y. 480. The complaint is not, therefore, to be condemned because it does not specifically state the value of the land exchanged for the stock delivered to the appellee.

The second paragraph of the appellant's answer alleges that on the 1st day of January, 1884, he entered into negotiations with the plaintiff for the exchange of forty-three shares of the capital stock of the Superior Manufacturing Company for the land described in the complaint, and on the 10th day of April of that year, a written contract was entered into embodying the terms of their agreement; that the land was of the value of three thousand dollars; that the defendant made no representations as to the value of the stock, or as to the financial condition of the corporation; that the plaintiff was elected president of the company and continued to occupy that position for fifteen months; that he did not inform the defendant that he was not satisfied with the exchange until the commencement of this action in

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March, 1886; that the stock was of value; that the original complaint of the plaintiff is filed with the answer as "Exhibit A"; that by his original complaint the plaintiff elected to rescind the contract of exchange; that by reason of his election to rescind, the plaintiff is precluded from prosecuting this action for damages; that the plaintiff is a resident of the State of Ohio; that the defendant is a resident of the State of Michigan; that at the time this action was commenced the defendant was the owner of personal property of the value of six thousand dollars in the State of Ohio, and of a like amount of personal property in the State of Michigan.

The answer must be good as a plea in confession and avoidance, or it must be deemed utterly without force, for the same paragraph of an answer can not be good both in confession and avoidance, and in denial. *Cronk v. Cole*, 10 Ind. 485; *Kimble v. Christie*, 55 Ind. 140; *Woollen v. Whitacre*, 73 Ind. 198; *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. Rep. 198); *Richardson v. Snider*, 72 Ind. 425; *State, ex rel., v. Foulkes*, 94 Ind. 493 (498); *Petty v. Trustees, etc.*, 95 Ind. 278.

If it were conceded that the answer is not bad because it both confesses and denies, and that it is a single plea in confession and avoidance, the conclusion must, nevertheless, be that it is insufficient. It can not be held that the answer shows that the plaintiff elected to affirm the contract by suing for a rescission, for there is no direct averment that he did sue for a rescission. We know that the original complaint is referred to as an exhibit, but we know, also, that it is not the foundation of the defence, and that by making it an exhibit the defendant did not add to the force of his answer. Facts must be pleaded directly and positively; it avails nothing as against a demurrer to plead them by way of recital. Nor is it always true that the mere bringing of a suit for rescission will bar an action for damages. *Lenox v. Fuller*, 39 Mich. 268; *Warren v. Cole*, 15 Mich. 264; *Kraus v. Thompson*, 30 Minn. 64; *Newnham v. Stevenson*, 10 C. B.

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713. It is no doubt true, as a general rule, that the prosecution of a suit for rescission to judgment will preclude an action for damages. But even this rule is held not to be without exceptions. Where two actions are pending at the same time an election may be compelled, and where expressly made it is ordinarily conclusive. *Moller v. Tuska*, 87 N. Y. 166. But where there is no election compelled by the action of the adverse party, and nothing more is done than to file a complaint for rescission, and in the same proceeding so amend it as to make it a complaint for damages, there is no such act or conduct as concludes the plaintiff. *Equitable, etc., Co. v. Hersee*, 33 Hun, 169. The case of *Pursley v. Wikle*, 118 Ind. 139, is not in point, for the question in that case was entirely different from the one here under consideration.

The facts stated in the special finding make a much stronger case in favor of the plaintiff than the complaint does, and what we have said disposes of all the questions presented by the conclusions of law, except the question arising on the conclusion of the court that the plaintiff is entitled to a vendor's lien as for unpaid purchase-money.

It is well settled that where a vendee fraudulently induces a vendor to accept in payment of the purchase-money property that is worthless, or of less value than that represented, the lien is not waived. *Fouch v. Wilson*, 60 Ind. 64 (28 Am. Rep. 65); *Himes v. Langley*, 85 Ind. 77; *Felton v. Smith*, 84 Ind. 485; *Madden v. Barnes*, 45 Wis. 135 (30 Am. Rep. 703); *Lord v. Jones*, 24 Me. 439; *Duke v. Balme*, 16 Minn. 306; *McDole v. Purdy*, 23 Iowa, 277; *Skinner v. Purnell*, 52 Mo. 96.

Judgment affirmed.

Filed May 17, 1890; petition for a rehearing overruled Sept. 18, 1890.

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Maxon et al. v. Lane et al.

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No. 13,967.

## MAXON ET AL. v. LANE ET AL.

**MORTGAGE.—Acquisition of to Perfect Title.—Endorser and Endorsee.—Foreclosure.—Estoppel.**—A party who acquires a mortgage for the purpose of perfecting a title for which he has previously bargained does not occupy the position of an ordinary endorsee. He occupies no better position than his assignors, and if their acts and representations worked an estoppel against them the estoppel operates against the assignees.

**SAME.—Representations Whereby Another is Induced to Change His Position.—Estoppel.**—If a party who holds a mortgage declares it to be invalid or agrees not to enforce it, or makes representations or does acts whereby another is induced to change his position and expend money, he is estopped by such representations and acts, whether fraudulent or not, to foreclose the mortgage.

**ESTOPPEL.—Representations.—Subsequent Denial.**—It is not necessary in order to create an estoppel that the person who makes the representations upon which another acts, should, at the time of making them, intend to defraud the person to whom they were made, for the fraud consists in subsequently attempting to gainsay or deny the representations to the injury of the persons who acted upon them.

From the Elkhart Circuit Court.

*J. M. Vanfleet*, for appellants.

*H. D. Wilson* and *W. J. Davis*, for appellees.

**ELLIOTT, J.**—The appellants set forth in their complaint a note and mortgage, and ask a decree of foreclosure. The appellees pleaded facts constituting an equitable estoppel, and the finding of the trial court fully sustains the allegations of the answer setting up that defence. We think it unnecessary to give a synopsis of the answers, for the facts exhibited in the special finding are substantially the same as those stated in the answer, and in deciding the questions presented upon the special finding we effectually dispose of all the questions in the record.

The facts, as they appear in the special finding, are substantially these: On the 22d day of July, 1858, Vincent Voisinett was the owner of the real estate described in the

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plaintiffs' complaint, and of the mill property and privileges owned by the defendants. On that day Voisinett conveyed to Allen, Cummins and Brown, and in the deed of conveyance was written this stipulation : " Said grantors also convey water to the amount of six hundred inches, to be furnished from the head of the race of the flouring-mill of said Voisinett, said supply of water to be constant and perpetual, the said grantees hereby agreeing to assist in keeping up the dam in the proportion of the amount of water used by them, and to construct and keep in order their own race." The property and rights of Allen, Cummins and Brown passed to Martin G. Sage and Norman Sage, by whom the property and rights were conveyed to a corporation named the Ball & Sage Wagon Company. On the 13th day of March, 1873, the Ball & Sage Wagon Company executed to Sarah Rawlings the note and mortgage described in the complaint, and the mortgage was recorded on the 15th day of May of that year. On the 20th day of June, 1873, Voisinett agreed to convey to Clark Lane the mill property and the residue of the water power, and on the 28th day of April, 1874, conveyed the property to him pursuant to that agreement, and Jacob C. Lane subsequently acquired an interest in the property. At that time the mill dam was out of repair and insecure, and for the purpose of improving the water-power and rebuilding the dam, Lane and the Ball & Sage Wagon Company entered into the following contract :

" Whereas, on or about the 22d day of July, 1868, Vincent Voisinett and wife did execute and deliver to H. H. Allen, S. M. Cummins and Brown a conveyance conveying a portion of the water-power of Elkhart river, situate on the east bank of said river and south of Jackson street, in the town of Elkhart, Indiana. The said conveyance being in the following words, to wit : ' Said grantors also convey water to the amount of six hundred inches, to be furnished from the head race of the flouring-mill of the said Voisinett ;' said



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supply of water to be constant and perpetual. The said grantees hereby agreeing to assist in keeping up the dam in the proportion to the amount of water used by them, and to construct and keep in order their own race. The said conveyance aforementioned at a subsequent date was purchased and is now owned by the Ball & Sage Wagon Company of said town of Elkhart. And, whereas, on the 19th day of August, 1873, said Voisinett and wife conveyed to Clark Lane, of Hamilton, Ohio, several tracts, parcels and lots of land, together with all the residue of their title and interest in and to said water-power first above named, saving and excepting therefrom thirty-six horse-power. And, whereas, several parties now owning said water-power intended to commence the improvement of the same at an early day, and to pay for said improvements in their due and proper proportions, also to stand jointly in the same proportion all costs and damages that may be sustained by others than themselves by reason of the making of said improvements. And, whereas, it is therefore necessary to define distinctly and definitely what shall forever be construed and admitted to be the true intent and meaning of six hundred inches of water as before named in said conveyance, and to fix the per cent. or proportion that the said Lane and the said Ball & Sage Wagon Company respectively shall pay towards the construction of said improvements, and also what they for themselves, their heirs and assignees agree shall forever after be binding upon them. Thereupon said Ball & Sage Wagon Company do now agree to the following, to wit: *First.* It is agreed that the said Ball & Sage Wagon Company are to have the right to, and that they shall on demand of said Lane, his heirs or assignees, place a water gauge or aperture of their own construction, not to exceed ten (10) inches by sixty (60) inches capacity of discharge into and above the bottom of their flume or forebay as at present constructed, and at the south end thereof where the same now connects with the main head-race. Said aperture to be forever thereafter kept in

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*Maxon et al. v. Lane et al.*

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good repair and of no greater capacity of discharge than ten by sixty inches as aforescribed, but said aperture or gauge may be so changed at any time to such shape or form as said Ball & Sage Wagon Company choose to adopt, and with privilege to place the same at any point above the present bottom of their flume as before described. *Second.* Said Lane and said Ball & Sage Wagon Company agree to build a good and suitable dam for said water-power across the Elkhart river at a point near the site of the present old dam, and also to fill the channel with a gravel and earth embankment of suitable height and strength to effectually fulfil the agreements and to take the place of what has generally been known as 'the channel dam' first named to be built to the full height of the old dam as originally constructed as nearly as can be ascertained. *Third.* Towards the construction expense of building said dams or dam and embankments aforesaid, the said Ball & Sage Wagon Company do hereby bind their said company and assignees to pay the one-tenth part of all expenses, and also to pay in like proportion the expenses of keeping the same in perpetual good order and repair, and also in like proportion to pay any damages that might be sustained by the overflow of the lands, etc. Forward & Little, now owners of the undivided one-sixteenth part of said water-power, and by virtue of their title to the same are liable for a one-sixteenth part of all such costs, damages, etc., aforesaid. And the said Lane, for himself, his heirs and assignees, does undertake and agree to construct and build all of the residue of said works not named in the foregoing, at his own expense, also to keep the same in good repair, and to perpetually after the construction of all said works to cause the same to be from time to time, as necessity may require, kept in good order and repair, and to pay his due proportion of all costs of same less the sum or proportion as above set forth, to be paid by said Ball & Sage Wagon Company and said Forward & Little."

Prior to and at the time the contract was entered into

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Martin G. Sage and Norman Sage were partners under the firm name of Sage & Sage, and as such partners owned all of the capital stock of the Ball & Sage Wagon Company, except \$1,800. The total amount of stock was \$20,000, and Martin G. Sage was president and Norman Sage treasurer of the corporation. They managed and controlled the corporate business. The corporation was largely indebted, and all of its indebtedness was to Sage & Sage. The indebtedness was nearly equal to the value of the property, and the earnings of the corporate business were received by Sage & Sage, and, after paying the running expenses, were applied to the payment of the debts of the corporation. At the time the contract was entered into Lane had no knowledge that Sage & Sage were the owners of the mortgage executed by the Ball & Sage Wagon Company, nor did he acquire such knowledge until this suit was commenced. Sage & Sage represented to Lane that they held all the indebtedness of the wagon company; that they were in possession and control of all of its property; that they had a right to manage its affairs and make contracts; that they would have all the corporate debts to pay, and were practically the owners of all of the property held by the corporation. Pursuant to the terms of the contract the parties repaired and improved the dam and water-power at a cost of \$20,000, each of the parties paying his proportion as provided in the contract. In April, 1881, the Ball & Sage Wagon Company, by Sage & Sage, sold all of its property to the appellants for \$5,000, the purchase-money was paid to Sage & Sage and by them credited on their claims against the corporation. After the sale was made and possession delivered it was found, upon consultation with an attorney, that a good title to the property could not be obtained by a deed from the corporation, and for the purpose of enabling the appellants to perfect their title, and for no other purpose, Sage & Sage transferred and endorsed the note and mortgage to the appellants. Sage & Sage agreed that they would pay all the costs and expense

of obtaining title through a foreclosure of the mortgage. Before the sale to the appellants the buildings of the wagon company were destroyed by fire, the company had ceased to do business and was wholly insolvent. On the 30th of June, 1883, the appellants recovered judgment against all the defendants to the suit except the appellees, the property was sold under the decree, and, no redemption having been made, a deed was executed to the appellants.

The trial court's conclusion of law was, "That the plaintiffs are not entitled to any decree against the defendants, Lane & Lane."

The appellants acquired the mortgage which they seek to foreclose for the purpose of perfecting a title for which they had previously bargained, and they do not occupy the position of ordinary indorsees. Nor have they been induced to part with money upon the faith of the validity of the mortgage, for they obtained it simply for the purpose of using it to perfect the title for which they had previously bargained. It is quite clear, therefore, that they do not occupy any better position than their assignors, and if the latter could not have foreclosed the mortgage, had they remained the holders of it, against the appellees, the appellants can not.

The appellants are bound by the acts and representations of their assignors, and if those acts and representations worked an equitable estoppel against the assignors that estoppel operates against them. In our judgment the representations and acts of Sage & Sage worked an estoppel which precludes the appellants from foreclosing the mortgage upon the interest of the appellees. Those representations secured the written contract which conferred a benefit upon Sage & Sage, and induced the appellees to lay out a large sum of money. As the representations have been acted upon, money parted with, and the position of the appellees changed in an essential particular, the holders of the mortgage can not gain-say the representations of their assignors to the injury of the parties who, relying upon them, changed their position and

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parted with money. If a party induces another to change his position and expend a large sum of money, equity will not permit such a party to reap any advantage from the change to the prejudice of the other; nor will it permit him to do what he has expressly or impliedly promised not to do. If a party who holds a mortgage declares it to be invalid, or agrees not to enforce it, and thus induces another to buy the property, the courts will not aid him by awarding him a decree of foreclosure. *Wisehart v. Hedrick*, 118 Ind. 341; *May v. Council*, 39 N. W. Rep. (Iowa) 879; *Wise v. Newatney*, 26 Neb. 88.

The principle which rules here is precisely the same as that which prevails in the class of cases which we have mentioned. A party may be concluded by inferences which naturally arise from his conduct as well as by express words. *Irvine v. Scott*, 85 Ky. 260. This principle was applied in *Risien v. Brown*, 73 Tex. 135, to a case very like the present.

It is not necessary in order to create an estoppel that the person who makes the representations upon which another acts should, at the time of making them, intend to defraud the person to whom they are made, for the fraud consists in subsequently attempting to gainsay or deny the representations to the injury of the person who acted upon them. *Wisehart v. Hedrick*, *supra*; *Babcock v. People's Savings Bank*, 118 Ind. 212; *Kelley v. Fisk*, 110 Ind. 552; *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301; *Quick v. Milligan*, 108 Ind. 419, and cases cited; *Anderson v. Hubble*, 93 Ind. 570 (47 Am. Rep. 394); *Humphreys v. Finch*, 97 N. C. 303 (2 Am. St. Rep. 293); *Bynum v. Preston*, 69 Texas, 287 (5 Am. St. Rep. 49).

Judgment affirmed.

Filed May 26, 1890; petition for a rehearing overruled Sept. 18, 1890.

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Brotherton v. Street *et al.*

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No. 14,397.

## BROTHERTON v. STREET ET AL.

**PROMISSORY NOTE.—Endorsement.—Complaint.**—The payee of a promissory note wrote upon the back thereof the words: "I sign this note to N. H. Garretson without recourse," and affixed his signature. Garretson wrote upon the back of the note these words: "I guarantee payment of this note when due to John F. Brotherton," his signature following the words, and Brotherton wrote thereon the words: "I guarantee payment of this note when due to the First National Bank of Lima, Ohio," and attached his signature.

*Held*, that the endorsement by the payee, notwithstanding the misuse of words, was sufficient to pass title to Garretson.

*Held*, also, that a complaint by Brotherton alleging the facts as above is bad, as it does not show title in the plaintiff.

From the Jay Circuit Court.

*D. T. Taylor, R. H. Hartford, J. B. Jaqua and J. A. Jaqua*, for appellant.

*C. Corwin and J. M. Smith*, for appellees.

**ELLIOTT, J.**—The complaint of the appellant is founded upon a promissory note, negotiable by the law merchant, executed by the appellees, and payable to Thomas J. McElroy. It is alleged that McElroy wrote on the back of the note these words: "I sign this note to N. H. Garretson, without recourse," and that he affixed his signature. We think this was such an endorsement of the note as passed title to Garretson, although there is a plain misuse of words, for the intent to vest title in Garretson is clear, and this intent it is the duty of the courts to carry into effect. It is further alleged that Garretson wrote on the back of the note the words: "I guarantee payment of this note when due to John F. Brotherton," and that his signature follows the words. It is also alleged that Brotherton wrote on the back of the note the words: "I guarantee payment of this note when due to the First National Bank of Lima, Ohio," and that he attached his signature to what he had written.

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The Central Union Telephone Company v. Hopper *et al.*

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If the writing on the back of the note signed by Garretson did not transfer title, then Brotherton acquired none, and can not maintain this action. If the writing was sufficient to transfer title, then the writing signed by Brotherton transferred title to the First National Bank, of Lima, and no title appears in the appellant, since it does not appear that the bank ever parted with the title to Brotherton, or to any one else. Whatever view, therefore, is taken of the complaint it is bad, for the reason that it does not show title in the plaintiff, and without title he can have no right of action. As the appellant has no complaint upon which a judgment can rest, it is unnecessary to pass upon the sufficiency of the answers.

Judgment affirmed.

Filed June 26, 1890; petition for a rehearing overruled Sept. 18, 1890.

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No. 14,320.

THE CENTRAL UNION TELEPHONE COMPANY v. HOPPER  
ET AL.

From the La Porte Circuit Court.

A. A. Thomas and J. H. Baker, for appellant.

J. H. Bradley, J. A. Thornton and J. H. Orr, for appellees.

OLDS, J.—This was a proceeding to compel the appellant, as a common carrier of telephone messages, by mandate, to furnish telephonic service to the appellees, who were engaged in business in Michigan City. The pleadings are substantially the same, and the questions involved are the same, and arise in substantially the same manner as those presented and decided in the case of the *Central Union Telephone Company v. State, ex rel.*, 123 Ind. 113. The same questions were also involved and considered at length, and the authorities reviewed in the case of the *Central Union Telephone Company v. State, ex rel.*, 118 Ind. 194, and we do not deem it necessary to set out the record, and state the manner in which the questions arise. On the authority of the cases herein cited, this case must be affirmed.

Judgment affirmed, with costs.

Filed June 26, 1890.

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*Held*, that the complaint does not state facts sufficient to constitute a cause of action, no facts being alleged to show that the relationship of carrier and passenger existed, and to remove the presumption that the defendant's freight trains were confined exclusively to the transportation of freight.

*Held*, also, that what his assailant's duties were, and what he was engaged in at the time of the assault, should have been averred.

*Smith v. Louisville, etc., R. R. Co.*, 394

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*Held*, that an indebtedness due from Myers to C. & Co., and the agreement of the latter to make further advances to the former, were an adequate consideration for the execution of the order as between the immediate parties thereto; and the agreement of Myers to ship, and his subsequent shipment to, and the receipt of material by, the Olds Wagon Works, were an adequate consideration for the acceptance of the order by the latter, and for the agreement to credit and pay the amount of such shipments to Coombs & Co. *Olds Wagon Works v. Coombs, 62*
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*Baleman v. Butler, 223*
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2. *Same.—Complaint.—Sufficiency of.*—In an action to rescind a contract for the sale of land, and to recover the same, where a complaint alleges that the defendant, for the fraudulent purpose of procuring a conveyance of the land, ingratiated himself into the confidence of an old, infirm, and weak-minded lady, and that by feigning an affection for her, and by falsely representing to her that he was a man of means, he obtained the land, worth \$4,000 for \$1,500, which by a condition in the mortgage could not be collected for ten years, fraud is sufficiently shown. *Ib.*

## CONVICT.

*Parole.—Violation of Conditions.—Pardon.—Credit for Good Conduct.—Release.—Prisoner When Entitled to.*—On the 25th of May, 1885, the appellant was sentenced to imprisonment for a term of five years. On the 17th of March, 1888, he was released from imprisonment on parole, but was recommitted to prison October 21st, 1889, at the command of the Governor, for a violation of the terms of the parole. Under the act allowing convicts good time the prisoner would have been entitled to his release on December 12th, 1889.

*Held*, that the parole by the Governor did not have the effect of an unconditional pardon, but was a mere parole, and that upon a violation of its conditions, which the prisoner had accepted, and which made the Governor the sole judge of the breach of the parole, the Governor had the power to order his recommitment to prison.

*Held*, also, that under section 1, Acts 1883 (Elliott's Supp., section 2026), allowing convicts credit for good time, the prisoner was not entitled to credit for good time during his absence on parole.

*Held*, also, that the prisoner was entitled to his discharge at the expiration of the time for which his sentence ran, less the time for which he was entitled to credit as good time earned, although for a part of the time covered by the sentence he was absent on parole, the conditions of which he violated. *Woodward v. Murdock, 439*

## CORPORATION.

1. *Gas Company.—Unauthorized Act of Individual Director.—Street Excavation.—Liability to Person Injured by Falling into.*—A gas company is not liable to a person injured by falling into a ditch left unguarded, which was constructed under the direction of one of the directors, without authority from the board to act for the company.

*Noblesville, etc., Co. v. Loehr, 79*

2. *Preferred Claim for Wages.—Statute.—Laborer Within Meaning of.*—The plaintiff was employed by the Broad Ripple Natural Gas Company to superintend the construction of its pipe lines. As superintendent he had full supervision of the digging of gas trenches, the laying of gas pipes, etc., with full authority to hire and discharge employees. The superintendency of the employees required considerable walking along the pipe lines, also, the testing of the wells made necessary the handling of wrenches and other tools for short periods of time, but aside from this he did no other physical or manual labor than was incident to his superintendency of the employees engaged in such work, and such as he at times did voluntarily. The company became insolvent, and a receiver was appointed.

*Held*, that the plaintiff was a laborer, within the meaning of the statute (Elliott's Supp., section 1605), and was entitled to have his claim for wages declared a preferred claim, to be paid before a distribution of the assets among the general creditors. *Pendergast v. Yandes, 159*

3. *Capacity to Sue.—Pleading.*—Where the plaintiffs in an action are described as the trustees of a certain Commandery Knights Templar, a capacity to sue is shown. The statute authorizes the incorporation of such bodies, and authorizes the election of trustees. The name under which the action is prosecuted imports a corporation.

*Smythe v. Scott, 183*

4. *Railroad.—Contract for Construction of Roadway.—Director's Unauthorized Act.*—A railroad company is not bound by a contract for the construction of the roadway made by one of its directors without authority; and the fact that the director owns a majority of the stock of the company does not alter the rule. *Allemong v. Simmons, 199*

5. *Same.—Garnishment.—Estoppel.*—The director of a railroad company,

with whom the company had a contract for the construction of a portion of its roadway, without authority from the company, made in the company's name a contract with certain contractors for the same portion of the roadway. After the contract was made the company was consolidated with another company. An action was brought upon an indebtedness claimed to be due from the contractors to the plaintiffs, and the corporations were garnisheed. There was no evidence that when the work was done under the contract by the principal defendants, either of the corporations had any knowledge of the unauthorized contract of the director. Although the corporations were garnisheed there was nothing to indicate that the contractors were looking to them for payment; nor did the estimates, which showed no more than that the materials furnished and work done were for the building of the line of the road of the consolidated corporation, indicate that the contract was made with the company. Estimates were made by the director's engineer to the chief engineer of the consolidated corporation, he supposing that they were for work done and material furnished by the director to the corporation under his contract.

*Held*, that on the evidence the company was not estopped to deny the indebtedness claimed. *Ib.*

6. *Subscription to Stock.—Articles of Association.—Acknowledgment.—Statutory Requirement.—Failure to Comply with.—Non-Liability of Subscriber.*—The statute (section 3851, R. S. 1881) requires that the persons who desire to organize a corporation shall "make, sign, and acknowledge, before some officer capable to take acknowledgment of deeds, a certificate, in writing," etc. The mere signing of the articles of association is not sufficient to complete the obligation, but in order to make valid and effective articles of association against all who sign, all must acknowledge them as the statute requires. One who simply signs the articles of association without acknowledging them, as the law requires, does not become a stockholder, and is not bound by his subscription. *Coppage v. Hutton, 401*

#### COST BOND.

See POOR PERSON, 2.

#### COSTS.

See TAX SALE, 4.

#### COUNTY.

See TAX SALE, 4.

#### COUNTY ASYLUM.

See COUNTY COMMISSIONERS, 2.

#### COUNTY AUDITOR.

See COUNTY COMMISSIONERS, 1.

#### COUNTY CLERK.

1. *Ministerial Duty.—Statute Defining.*—Section 1213, R. S. 1881, provides that where an issue involving the question of suretyship is made between defendants jointly sued, if the issue be found in favor of the surety, the court shall make an order directing the sheriff to levy the execution first upon and exhaust the property of the principal before a levy shall be made upon the property of the surety, "and the clerk shall endorse a memorandum of the order upon the execution." *State, ex rel., v. Fleming, 97*
2. *Same.—Execution.—Failure to Endorse Order to Exhaust Principal's Property.—Liability for Neglect.*—The complaint in an action by a surety

against the clerk of the court and the sureties on his official bond, based upon the above statute, alleged that the clerk of the court failed to set out the order of the court in the execution directing the sheriff to levy the execution first upon the property of the principal and to endorse a memorandum of the order thereon as required, and that in consequence the property of the plaintiff instead of that of the principal was sold to satisfy the execution, which to prevent further loss he was required to redeem. It further alleged the possession by the principals, at the time the execution was issued, of sufficient property to have satisfied the execution, but that "soon after the levy and sale of the property of the surety they became insolvent, and have continued so."

*Held*, that the complaint is insufficient, and demurrable, since it fails to allege such a state of facts as to show affirmatively that the plaintiff suffered loss and that the loss was occasioned by the officer, it not appearing by the averments of the complaint of what character the property was, or whether or not it was subject to execution, for, if so, the plaintiff, subrogated to the rights of the judgment creditor, could have seized the property for his reimbursement. *Id.*

#### COUNTY COMMISSIONERS.

See COUNTY SUPERINTENDENT, 1, 2, 7; DRAINAGE, 3; TOWNSHIP TRUSTEE; TURNPIKE.

1. *Auditor.—Accounts of.—Change in Method of Keeping.—Fees can not be Increased.*—County commissioners have no power to add new duties to a public office, and to provide extra compensation therefor, by contract with the officer; and, hence, a county auditor who, under an order of the board, adopts a different method for keeping an account of the various funds, and of making semi-annual settlements, from that prescribed by the Legislature, can not recover compensation for the extra work done. *Lee v. Board, etc., 214*
2. *County Asylum.—Insane Person.—Contract for Care and Support.—Invalidity of.—Quantum Meruit.*—A contract made by the board of county commissioners with a guardian for the care and support of his insane ward in the county asylum at an agreed price to be paid out of the ward's estate, is invalid, and no recovery can be had thereon against the ward's estate, nor can there be a recovery by the county on the *quantum meruit*. A person who is admitted into a county asylum, organized for the support of the poor, can not be charged therefor, either on an express or implied contract. *Board, etc., v. Ristine, 242*
3. *Drainage Proceedings.—Appeal.—Remanding of Cause.*—Where the appeal from the board of commissioners to the circuit court involves a particular matter embraced in one or more issues, it is the duty of the circuit court to try such matter *de novo*, and to render a final judgment thereon, after which the cause may be remanded to the board of commissioners for further proceedings in accordance with the judgment. Where, therefore, on appeal the questions for trial are the utility of a ditch and the legality of the order establishing it, and the circuit court upon a trial *de novo* finds in favor of the petitioners on the question of utility, and in favor of the appellants as to the other question, it has the right to remand the cause to the board, with directions to proceed according to its judgment. *Sharp v. Malia, 407*

#### COUNTY SUPERINTENDENT.

1. *Special Bond Required by School Book Law.—Failure to Give Within Time Limited.—Rejection of Bond by County Commissioners.—Appeal.*—On the 3d day of June, 1889, the plaintiff was elected county superintendent



of schools of Knox county. On the 20th day of June, 1889, the board of commissioners declared the office vacant, because of the failure of the plaintiff to file the special bond required by section 10 of the act of March 2d, 1889. The plaintiff presented the special bond required by statute on August 12th, 1889, but it was rejected by the board. The plaintiff appealed from the decision of the board refusing to accept the bond, to the circuit court.

*Held*, that the rejection of the bond, since it operated to bring in question the plaintiff's right to the office, which was declared vacant, was a judicial act, and that, therefore, an appeal lay. *Board, etc., v. State*, 61 Ind. 379, doubted and distinguished. *Board, etc., v. Johnson*, 145

2. *Same.—Vacancy of Office.—Question as to, Judicial.—Decision of Board of Commissioners.—Appeal.*—The question whether an office is or is not vacant, is intrinsically a judicial one; and where the board of commissioners assumes to declare a legislative office vacant, it assumes to exercise judicial power, and an appeal will lie from the decision. *Ib.*
3. *Same.—Special Bond.—When Must be Filed.—Statute.*—Under section 10 of the act of 1889 all superintendents elected after the passage of the act must file a special bond within thirty days after their election; but superintendents elected prior to the taking effect of the statute are allowed thirty days to file such bond after the issuance of the Governor's proclamation. *Ib.*
4. *Same.—Official Bond.—Filing of.—Statute, Directory.—Title to Office.—Non-Forfeiture of.*—The statutes, however, requiring official bonds to be filed within a designated time are directory, and not mandatory. Unless the statute makes the filing of a bond within a limited time a condition precedent to the right to the office, the failure to file it within the time prescribed will not work a forfeiture of the right to the office, nor create a vacancy; and hence the mere failure by the superintendent elected after the passage of the act, and rightfully in office, to give the additional and special bond required, did not forfeit his title to the office, and authorize the office to be declared vacant. *Ib.*
5. *Same.—Ouster of Officer.—Judicial Power.*—The power to oust an officer rightfully in office is essentially a judicial one, except where it is exercised by the appointing power. *Ib.*
6. *Same.—Official Bond.—Doubt as to Time of Filing.—Ouster Without Hearing.*—Where an officer is rightfully in office, and there is a fair question as to whether the time within which he is directed to file a special bond in order to entitle him to continue in office begins to run from the date of his election, or upon the happening of a future event, and he files a bond within the time designated after such event does happen, a declaration that he has vacated the office, made without a hearing, does not oust him. *Ib.*
7. *Special Bond.—Refusal of County Commissioners to Accept.—Mandamus.—Title.—Collateral Attack.*—In an action brought by a county superintendent duly elected, qualified, and in possession of the office, to compel by mandate the approval of the special bond required by the school book law, an answer alleging that the superintendent was elected by means of a corrupt agreement entered into between the county auditor and such superintendent is bad. The title of a superintendent, duly elected and qualified, can be attacked only in a direct proceeding, and not by collateral means.

*State, ex rel., v. Board, etc.*, 554

#### COUNTY TREASURER.

*Fictitious Items of Account.—Liability for Money Actually Received from Predecessor.*—The amount with which a county treasurer was charged was

made up of fictitious items instead of the true item—money received from his predecessor on account of a certain gravel road fund.  
*Held*, that the treasurer must account for the money actually received notwithstanding such error in making up the items of the charge.  
*Beaver v. State, et al., 324*

COVERTURE.

See MARRIED WOMAN.

CRIMINAL LAW.

1. *Perjury.—Sufficiency of Affidavit.*—An affidavit, and an information based thereon, charging the defendant with perjury, alleged that on a certain day, before the mayor of the city of Indianapolis, sitting as a court, an affidavit was filed by James R. Shea, charging the defendant with knowingly permitting a certain room to be used and occupied for gaming; that the defendant was arraigned upon said affidavit and tried before said mayor; that upon said trial the defendant offered himself as a witness in his own behalf, and was duly sworn by said mayor, he having authority to administer said oath; that, upon the trial of said issue, it became material whether certain persons named were in a certain room known as 306 East Washington St., in said city, on Sunday, and whether on said day, in said room, they were playing cards for money; that the defendant then and there swore, on the trial of said issue, unlawfully, feloniously, willfully, corruptly and falsely, that the said persons were not in said room on said day, and did not play cards for money in said room on said day. Then follows a proper negation of the truthfulness of the defendant's testimony, together with the averment that the defendant knew when he gave the testimony that it was false.  
*Held*, that the affidavit was sufficient. *Stefani v. State, 3*
2. *Same.—Variance.*—The affidavit in the prosecution for perjury charged that the affidavit before the mayor was made by James R. Shea. The record entry made by the mayor stated that the affidavit was made by R. Shea, but the affidavit as it appears in such record discloses the name of "James R. Shea" subscribed thereto.  
*Held*, that there was no variance. *Ib.*
3. *Same.—Affidavit.*—It having been alleged in the affidavit that the prosecution was instituted and tried before the mayor of Indianapolis sitting as a court, the court in which the perjury is alleged to have been committed is sufficiently described. *Ib.*
4. *Same.—Filling of Blank in Affidavit.*—The filling of the blank in the affidavit with the street number of the building after the trial was commenced, the affidavit not being filed thereafter nor resworn to, was not available error, as the number of the building was immaterial to the sufficiency of the affidavit. *Ib.*
5. *Same.—Affidavit and Information.—Filing in Open Court.—Statute.*—The affidavit and information are not required by statute to be filed in open court as are indictments. It is sufficient to file the information with the clerk. *Ib.*
6. *Same.—Word "Session" in Section 1679, R. S. 1881.—Meaning of.*—The word "session," as employed in section 1679, R. S. 1881, is equivalent to the word "term," when applied to the sitting of a court, and does not mean that the court must be actually open for the transaction of business. *Ib.*
7. *Misconduct of Prosecuting Attorney.—When not Ground For New Trial.*—Where, on the trial of a criminal cause, the prosecuting attorney made a remark to which the counsel for the defendant objected, and the court stated that "the statement of the prosecuting attorney

was improper," and the prosecutor said, "Then I withdraw the remark," and the court was not asked to make any ruling in respect to the remark of the prosecuting attorney, there was no error in refusing to grant a new trial because of the alleged misconduct of the prosecuting attorney in making said statement. *Drew v. State, 9*

8. *Same.—Evidence.—Coroner's Record.—Oral Testimony as to Contents of.—Competency of Not Properly Raised.*—Where a coroner testified orally as to what a certain witness had stated on the inquest, but no objection was made at the time to such testimony on the ground that the coroner was giving oral testimony of the contents of his record made at the inquest, no question is presented by the motion for a new trial assigning such reason as an objection to the competency of the evidence. *Ib.*
9. *Same.—Bad Character of Accused.—Evidence as to.—When Competent.*—Where the defendant in a criminal case testifies in his own behalf, it is competent for the State to introduce evidence as to the general bad moral character of the accused. *Ib.*
10. *Same.—Specific Unlawful Acts.—Evidence Concerning.—When only Admissible.*—In a criminal case, after evidence has been introduced as to the general bad moral character of the accused, it is not competent for the State to prove the defendant's reputation in regard to the commission of a specific unlawful act. Proof can not be introduced by the State of specific traits of character of the defendant, unless the accused first puts such traits of character in issue by the introduction of evidence as to his general reputation in that respect. *Ib.*
11. *Gaming Implements.—Seizure of by Sheriff.—Order of Court.*—Gaming devices seized and taken into the possession of the sheriff at the time of making the arrest of one charged with unlawfully keeping and exhibiting gaming implements for gain, are subject to the order of the court the same as if taken by virtue of a search warrant in the hands of a constable, and afterwards delivered to the sheriff. *State v. Robbins, 308*
12. *Same.—Gaming Apparatus.—Summary Destruction of.*—Unless articles seized are of such a character that the law will not recognize them as property entitled as such to its protection under any circumstances, they can not be summarily destroyed without affording the owner an opportunity to be heard upon the subject of their unlawful use, and to show whether or not the articles are intrinsically useful or valuable for any other purpose than gambling, or whether their only recognized value and customary use are as implements for gaming. *Ib.*
13. *Same.—Order for Destruction of Gaming Implements.—Application for.—When Must be Made.—Jurisdiction.*—The application for the order for the destruction of the gaming devices seized must be made before or at the time the judgment is pronounced. After having pronounced final judgment the court has no jurisdiction to enter upon an inquiry concerning the character of the property, and make an order for its destruction. *Ib.*
14. *Renting Room for Gaming Purposes.—Evidence.—Statute.*—It shall be sufficient evidence of the fact that a building or room was rented for the purpose of gaming if gaming is actually carried on therein with the knowledge of the owner, or under such circumstances that he has good reason to believe that his room is being so used, and takes no reasonable steps to restrain the occupant from continuing the unlawful use. Section 2079, R. S. 1881. Hence direct evidence to prove that there was a specific agreement or intent on the part of the lessor and his lessee at the time he leased the room that it was to be used for the purpose of gaming, is unnecessary. *Voght v. State, 358*

15. *Same.—Burden of Proof.—Statutory Presumption Affecting.—Constitutionality of Statute.*—While statutes which undertake to make proof of certain facts absolute or conclusive of guilt are unconstitutional, those which merely declare statutory presumptions affecting the burden of proof, are valid. *Ib.*
16. *Same.—Evidence.—Competency of.*—Any evidence which tends to prove that gaming is actually carried on in the room, and that the lessor knows, or has good reason to believe that it is being carried on and suffered by his lessee, is competent as tending to prove, or raise a presumption, that the room is rented for the purpose of gaming. *Ib.*
17. *Same.—Evidence that it was generally reputed that the room was kept as a gambling room, and that the lessee who had been indicted had pleaded guilty to the charge of keeping a room in which gambling was permitted while occupying the lessor's room, was competent as tending to raise an inference that the lessor, who was engaged in business near by, in the same community with the lessee, knew of the facts.* *Ib.*
18. *Same.—Use by Tenant of Room for Unlawful Purpose.—Remedy of Landlord.*—The mere fact that a tenant uses premises for an unlawful purpose does not, of itself, avoid the lease; but the landlord may apply to a court of equity to restrain the tenant and to avoid or forfeit the lease. *Ib.*
19. *Forgery.—Indictment.—Forged Instrument.—When Need not be Set Out in Hæc Verba.*—Where an instrument alleged to be forged is lost, destroyed, in the hands of the defendant, or its whereabouts are unknown to the grand jury returning the indictment, such instrument need not be set out *in hæc verba*, but it is sufficient to set out the substance and describe the instrument, and state the reason why the grand jury are unable to set it out *in hæc verba*. *State v. Callahan, 364*
20. *Same.—Forged Instrument.—Reasons for not Setting out in Hæc Verba.—Statement of Disjunctively.*—The statement of two reasons laid in the disjunctive why the forged instrument is not set out *in hæc verba* does not render the indictment bad, such averments not relating to the statement of the charge, or the definition of the offence. *Ib.*
21. *Kidnapping.—Statute.—Exceptions.*—An indictment for kidnapping based upon section 1915, R. S. 1881, which defines the offence as follows: "Whoever kidnaps or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons any person with the intention of having such person carried away from his place of residence unless it be in pursuance of the laws of this State or of the United States, is guilty of kidnapping," etc., must in addition to alleging the unlawful and felonious character of the acts with which the defendant is charged, negative the exceptions in the statute, and allege that the acts were not done in pursuance of the laws of this State or of the United States. *State v. Kimmerling, 332*
22. *Same.—Exception in Statute.—Averment in Negation of.—Insufficiency.*—An averment in the indictment that the defendant carried away from her residence the person named, "not then and there having established a claim upon her according to the laws of the State of Indiana or the United States," is not the equivalent of that required by the statute. *Ib.*

## DAMAGES.

See ASSAULT AND BATTERY, 3; ATTORNEY AND CLIENT, 5; CONTRACT, 15; DRAINAGE, 9; EASEMENT, 2; EMINENT DOMAIN, 5; REAL ESTATE, ACTION TO RECOVER, 3; REPLEVIN, 3.

## DEBTOR AND CREDITOR.

See SLANDER, 2.

## DECEDENTS' ESTATES.

1. *Widow's Claim.—Petition.—Presumption as to Chastity.*—A widow in her petition to have the distributive share of the funds in the hands of the administrator set off to her, need not aver that she has not deserted her husband and that she was not living in adultery at the time of his death. Chastity is presumed in the absence of averments and proof to the contrary. In such action, the petition is sufficient if it apprises the administrator of the nature of the claim, and is sufficient to bar another action for the same demand.

*Sherwood v. Thomasson, 541*

2. *Same.—Trial by Jury.*—Where an application is made for an order upon an administrator to pay over a sum of money out of a fund which remains in his hands for distribution to one who claims as distributee, no jury is allowable. In such case it is the duty of the court to hear the proof, and after determining who is entitled to the fund to order it paid to the parties proving their titles to their respective shares. *Id.*
3. *Same.—Widow.—Witness.*—In a suit by a widow against the administrator of her deceased husband to recover her share of the fund which remains in his hands for distribution, the widow is a competent witness. *Id.*

## DECLARATIONS.

See EVIDENCE, 11.

## DEED.

See CONVEYANCE, 1; REAL ESTATE, 2; TAX SALE, 1.

## DEFAULT.

See RECOGNIZANCE.

## DEMAND.

See REPLEVIN, 4, 5.

## DEPOSITION.

1. *Retaking of After Reversal of Cause.—Suppression.*—Where, after the reversal of a judgment because of error in suppressing parts of the depositions of certain witnesses taken by the appellant, the appellant, without an order of court, takes again the depositions of the same witnesses, it is not error to suppress the second set of depositions, the appellant having refused to accept the permission of the court to read either the first or second set, but not both.

*Scott v. Scott, 66*

2. *Notice.—Sufficiency of.*—A deposition will not be suppressed on the ground that the notice was insufficient, if the notice given secured the attendance of all the parties at the proper place and time.

*Long v. Straus, 84*

3. *Same.—Pendency of Appeal.*—Depositions to preserve testimony may be taken at any time, and the fact that the case is pending on appeal does not deprive the parties of this right. *Id.*

## DESCRIPTION.

See DRAINAGE, 2, 7; MORTGAGE, 3, 4, 7; REAL ESTATE, 2.

## DISCRETION.

See POOR PERSON, 1.

## DITCH.

See DRAINAGE, 2 to 6, 8 to 11.

## DRAINAGE.

See COUNTY COMMISSIONERS, 3; SPECIAL FINDING, 3.

1. *Appeal.—Amendment of Petition.*—Upon an appeal in a drainage proceeding, begun before the board of commissioners, it is in the discretion of the circuit court to permit an amendment of the petition.  
*Metty v. Marsh, 18*
2. *Same.—Location of Ditch.—Description.*—Under the statute, section 4286, R. S. 1881, a particular description of the location of the proposed ditch, or drain, is not required. The petition is sufficient if it contains a general description of the proposed starting point, route, and terminus of the ditch.  
*Ib.*
3. *Same.—County Commissioners.—Remonstrance.—Appeal.*—All grievances growing out of the establishment and construction of a public ditch should be presented to the board of commissioners, and settled in that tribunal. The aggrieved parties may remonstrate before the board against the report of the viewers, or reviewers, and where, having opportunity to file their remonstrances, they fail to do so, the circuit court may properly refuse to allow them to be filed on appeal.  
*Ib.*
4. *Same.—Appeal.—Motion for Judgment.*—Where, on such appeal, there is no issue for trial, it is not error for the court, the question of the jurisdiction of the board having been disposed of, to sustain the appellee's motion for judgment establishing the ditch, on the petition, report of viewers, etc.  
*Ib.*
5. *Assessments.—Drainage Commissioner's Notice.*—Where an assessment for the construction of a ditch has been approved and confirmed by the court, the failure of the drainage commissioner to give notice "as soon as may be" after he was appointed, as required by section 5, act 1883, can not be set up in bar of an action against one of the original parties to the proceeding. The assessment as approved and confirmed by the court constitutes a lien on the land assessed at the date of filing the petition, except where lands are omitted in the petition and afterwards assessed and reported by the commissioners.  
*Kennedy v. State, ex rel., 239*
6. *Same.—Pleading.—Complaint.—Jurisdiction.*—In such action, where the complaint alleges the filing of the petition, the giving of notice, the reference to the commissioners of drainage, and the approval of their report, the jurisdiction by the court of the subject-matter is sufficiently shown although the verification of the original petition in the drainage proceeding is not alleged.  
*Ib.*
7. *Insufficient Description of Property Assessed.—Reformation.*—A drainage commissioner, on a showing that in the original petition there was an insufficient description of the property upon which the assessment was levied, is entitled to have the description so corrected, or reformed, as to make the assessment effective.  
*State, ex rel., v. Smith, 302*
8. *Ditch Assessments.—Delinquency.—Tax Sale.—Purchaser's Lien.*—A ditch tax, for which a certificate had been issued, was placed upon the tax duplicate, under section 4305, R. S. 1881, in August, 1883, at which time the State and county taxes against the land were delinquent. In the December following the owners of the land paid the delinquent State and county taxes, but failed to pay the ditch tax; whereupon the land was advertised and sold for the ditch assessment.  
*Held*, that the ditch tax, which was due immediately upon the issuance of the certificate, became delinquent upon the first Monday of November, 1883, and that the sale transferred to the purchaser the lien of the tax.  
*Cullen v. Straus, 340*
9. *Same.—Damages.*—In such case the purchaser is entitled to a decree

for the sale of the land to satisfy the lien, the amount of taxes subsequently paid, with the statutory interest and penalty. *Ib.*

10. *Repair of Drains.—Allotments to Land-Owners.—Statute Construed.*—Under section 2 of the act entitled "An act prohibiting the obstruction of ditches or drains, providing a method of keeping them in repair," etc. (Acts 1889, p. 53), it is the duty of the county surveyor to allot to each tract of land benefited by a ditch constructed before its passage the portion of the ditch which in his judgment the owner of such land should keep in repair, except in cases where an allotment has been made by reviewers. Allotments made by the viewers may be ignored by the surveyor, such allotments not having been excepted from the operation of the act. *Wheatley v. Romack, 430*
11. *Establishment of Ditch.—What Must be Shown.*—The statute providing for the establishment of a ditch, does not require that a proposed ditch shall be of public utility, benefit highways and promote public health, for if it will accomplish any one of these things, the petitioners have a right to have it established, and if its construction will specially benefit lands in the vicinity, the cost of constructing it may be assessed against the lands. *Perkins v. Hayward, 445*
12. *Inadequacy of Original Assessment.—Reassessment of Benefits.*—In case the original assessment of benefits made in a drainage proceeding, instituted under the act of April 6th, 1885, proves inadequate to complete the work, it is competent for the court, upon due petition and notice, to refer the matter to the commissioners of drainage, or if they be for any reason incompetent to act, to new commissioners, for the purpose of reassessing benefits, in order to complete the work, or pay the deficit in case the work has been completed. *Rogers v. Voorhees, 469*

#### DUE PROCESS OF LAW.

See PLEADING, 9.

#### EASEMENT.

1. *Surface Water.—Rights of Adjacent Owners.*—A land-owner, who by means of ditches and drains concentrates surface water, and by that means carries it where it was not accustomed to flow, and discharges it on a lower land-owner, is liable for the payment of the damage caused thereby. *Weddell v. Hapner, 315*
2. *Same.—Damages.*—In such case the plaintiff is entitled only to compensatory damages. *Ib.*
3. *Right of Way.—Grant of.—Ownership of Streams, Etc.*—The grant of a right of way to a railroad company being the grant only of an easement, the owner of the fee remains the owner of springs, streams, and minerals. Subject to the use of the right of way, he may make all lawful use of the land. *Smith v. Holloway, 329*
4. *Same.—Parol Reservation of Water Right.—Statute of Frauds.*—A parol agreement reserving to the grantor the right to use the water of a stream which runs across the land granted for the purpose of a road, is not void under the statute of frauds; the right to the water remaining in the grantor, he is, by the agreement, but confirmed in his existing legal right. *Ib.*

#### EJECTMENT.

See REAL ESTATE, ACTION TO RECOVER.

#### EMINENT DOMAIN.

1. *Public Highway.—Appropriation.—Compensation of Abutting Owner.*—The owner of land abutting on a public highway has a special private interest in the land upon which the highway is located which can not be appropriated without compensation. *Kincaid v. Indianapolis, etc., Co., 577*

2. *Same.*—*County Commissioners.*—*License to Natural Gas Company to Lay Pipes.*—*Private Property Rights.*—A license granted by the board of commissioners to a gas company to lay a line of pipes in a public highway is effectual to convey the right of the county to such highway, but it does not affect private property rights. *Ib.*
3. *Same.*—*Highway.*—*Use for Other than Highway Purposes.*—*Additional Burden.*—The appropriation of land for a rural highway entitles the local officers to use it only for highway purposes. A use for any other than a legitimate highway purpose is a taking, within the meaning of the Constitution, since it imposes an additional burden upon the land. *Ib.*
4. *Same.*—*Laying Gas Pipes.*—The laying of gas pipes in a suburban road is the imposition of an additional burden, and compensation must be made to the abutting owner. *Ib.*
5. *Same.*—*Public Policy.*—*Injunction.*—*Damages.*—Where a gas company, on the faith of a license from the board of commissioners, expends large sums of money in laying its line of pipe in a public highway, and a large number of citizens acquire rights upon the faith of the successful prosecution of the enterprise, an abutting owner who, with knowledge of the facts, stands by without objection until the completion of the main line and system, can not interfere by injunction to the serious impairment of the rights of the company and the public, but must seek his remedy at law, in an action for damages. *Ib.*

#### ENDORSEMENT.

See PROMISSORY NOTE, 2.

#### ESTOPPEL.

See CORPORATION, 5; MORTGAGE, 8, 9.

1. *Who May Take Advantage of.*—One who insists upon the acts of another as working an estoppel, must show that he acted upon the same and was influenced thereby to do some act which would result in an injury if the other is permitted to gainsay or deny the truth of what he did. *Chaplin v. Baker, 385*
2. *Representations.*—*Subsequent Denial.*—It is not necessary in order to create an estoppel that the person who makes the representations upon which another acts, should, at the time of making them, intend to defraud the person to whom they were made, for the fraud consists in subsequently attempting to gainsay or deny the representations to the injury of the persons who acted upon them. *Maxon v. Lane, 592*

#### EVIDENCE.

- See ATTORNEY AND CLIENT, 3 to 5; CRIMINAL LAW, 8 to 10, 14 to 17; FRAUDULENT CONVEYANCE, 1, 3; INSURANCE, 3; MUNICIPAL CORPORATION, 1, 2, 12; OFFICE AND OFFICER, 3; PRACTICE, 1; PROMISSORY NOTE, 1; RECOGNIZANCE, 2; REPLEVIN, 5; SLANDER, 1 to 3, 5, 6; STATUTE OF FRAUDS; SUPREME COURT, 1, 3, 4; WILL, 3.
1. *Exclusion of.*—Where offered evidence is at all material, and is relevant, it is error to exclude it; and this error will be available for reversal except in cases where it clearly appears that the exclusion works no harm. *Colglazier v. Colglazier, 196*
  2. *Objection to.*—*Must be Specific.*—No question is presented by an objection that offered evidence is "incompetent, irrelevant and immaterial." The objection must be specific. *Cincinnati, etc., R. W. Co. v. Howard, 280*
  3. *Same.*—*Examination of Parties.*—*Admission in Evidence of Answers to Interrogatories.*—*Objection of Irrelevancy.*—The plaintiff having the right to introduce in evidence the answers to questions propounded to



the defendant (section 359, R. S. 1881), the defendant can not complain of their introduction on the ground of irrelevancy, since if the *interrogatories* are irrelevant he should move their rejection, and if the *answers* are irrelevant the fault is his own. *Ib.*

4. *Admissibility.—Question of.—Improper Presentation.*—No question is presented as to the admission of evidence where it does not appear from the record how the evidence was given—whether it was in response to a question or was volunteered—or what objection was made. *Clavin v. Fagan, 304*
5. *Part of not in Record.—Effect of as to Evidence Objected to.*—Where all the evidence is not in the record, all reasonable intendments will be indulged in favor of the ruling of the trial court as to the admission of evidence. Under such circumstances, if the evidence objected to would have been admissible under any possible contingency, the Supreme Court will not hold that available error has been committed. *Perkins v. Hayward, 445*
6. *Testimony by Comparison of Signature.—Non-Expert Witnesses.—Cross-Examination.*—Where the genuineness of a signature to a bond in suit is in dispute, papers not in evidence in the cause nor admitted to be genuine can not be used for making comparisons between the signatures thereto and the signature whose genuineness is disputed, and it is not error to refuse to allow the plaintiff to cross-examine the defendant's witnesses, who are not experts, and who have not referred to the papers in their direct examination, with reference to the genuineness of the signatures to such papers. *White Sewing Machine Co. v. Gordon, 495*
7. *Same.—Microscopic Enlargement of Signature.—Inadmissibility of.*—It is not error to refuse to submit to the jury for inspection a microscopic enlargement of a disputed signature, where the original is in court and where it is not proposed to compare it with enlarged copies of signatures admitted to be genuine. *Ib.*
8. *Same.—Jury.—Incompetency of Testimony.*—A witness, shown to be acquainted with another's handwriting, may refer to the papers in his possession known to be in the writing of another, for the purpose of refreshing his memory before testifying, but such papers, the signatures to which not having been admitted to be genuine, are not competent testimony to go to the jury. *Ib.*
9. *Conversation Between Third Person in Absence of Party.—Inadmissibility.*—Evidence of a conversation between third persons in the absence of a party, is not admissible against the latter. *Tobin v. Young, 507*
10. *Same.—Exclusion of.*—Where questions are not asked a witness, there is no available error in excluding offered testimony. *Ib.*
11. *Same.—Self-Serving Declarations.*—Written statements made by a third person through whom a party claims, are inadmissible against the opposite party, if made without his knowledge. Self-serving declarations are not competent as a general rule. *Ib.*
12. *Same.—Effect of Admissions.—Instruction.*—It is not error to refuse to instruct the jury as to what effect shall be given to admissions of a party. *Ib.*
13. *Admission of without Objection.*—Where evidence is admitted without objection error can not be predicated upon such admission. *Pool v. McGahan, 583*

#### EXAMINATION OF PARTY.

See EVIDENCE, 3.

**EXCESSIVE DAMAGES.**

See **NEW TRIAL**, 1.

**EXECUTION.**

See **COUNTY CLERK**.

**EXECUTIVE APPOINTMENT.**

See **OFFICE AND OFFICER**.

**EXHIBIT.**

See **JUDGMENT**, 2; **MORTGAGE**, 3.

**EXPERT AND OPINION EVIDENCE.**

See **RAILROAD**, 1, 15.

**FEES AND SALARIES.**

See **COUNTY COMMISSIONERS**, 1.

**FELLOW-SERVANTS.**

See **MASTER AND SERVANT**, 4.

**FENCE.**

See **HIGHWAY**; **RAILROAD**, 2, 13, 14.

**FORECLOSURE.**

See **MORTGAGE**, 4 to 9; **TAX SALE**, 4.

**FORFEITURE.**

See **RECOGNIZANCE**; **SCHOOL LANDS**.

**FORGERY.**

See **CRIMINAL LAW**, 19, 20.

**FORMER ADJUDICATION.**

See **REPLEVIN**, 4; **VENDOR AND PURCHASER**, 2.

**FRAUD.**

See **ESTOPPEL**; **INSURANCE**, 5; **JUDGMENT**, 3; **TOWNSHIP**, 4, 5; **VENDOR AND PURCHASER**, 3.

**FRAUDULENT CONVEYANCE.**

See **SLANDER**, 2.

1. *Husband and Wife.—Title to Property Transferred.—Evidence.*—A wife brought an action against a constable and the creditors of her husband to recover the possession of personal property taken under execution against the husband. The theory of the defendants was that any title which the plaintiff had to the property was acquired through her husband in fraud of his creditors.

*Held*, that it was competent for the defendants to prove that a certain mare—part of the property levied upon—was kept in a stable which was under the control of the husband as tenant.

*Laird v. Davidson*, 412

2. *Same.—Husband and Wife.—Loan.—Promissory Note for.—Preference of Wife.*—From whatever source the wife acquired money, so that its acquisition was not tainted with bad faith, she had a right to loan it to her husband and take his promissory note therefor; and, when in failing circumstances, he had a right to prefer her to the exclusion of other creditors. *Ib.*
3. *Same.—Civil Action.—Evidence.—Preponderance.*—In a civil action, whenever the plaintiff has a preponderance of evidence in his favor

as to any fact as to which he has the *onus*, he is entitled to have that fact found in his favor. *Id.*

#### FRAUDULENT REPRESENTATIONS.

See PLEADING, 10.

#### GAMING.

See CRIMINAL LAW, 11 to 18.

#### GAMING IMPLEMENTS.

See CRIMINAL LAW, 11 to 18.

#### GARNISHMENT.

See CORPORATION, 5.

#### GAS COMPANY.

See CORPORATION, 1, 2; EMINENT DOMAIN.

#### GOVERNOR'S COMMISSION.

See OFFICE AND OFFICER, 2, 4, 5.

#### GRADED SCHOOL.

See TOWNSHIP, 1, 2.

#### GUARDIAN AND WARD.

See COUNTY COMMISSIONERS, 2.

*Report and Inventory.—Citation of Court.—Notice.*—Upon the failure of a guardian to comply with an order of the court requiring him to make a report and file an inventory *instantly*, a citation was issued commanding him to do so within three days, but after the citation was issued there was a delay of twelve days before any further action was taken by the court; and at the end of that time, the guardian having disregarded the order of the court, his successor was appointed. *Held*, that it can not be objected by the guardian that the notice was insufficient. A guardian is required by the statute (section 2521, R. S. 1881) to file an inventory of his ward's estate within three months after his appointment, and upon his failure to do so the court may summarily remove him and appoint his successor. *Ex Parte Cottingham, 250*

#### GUARDIAN'S REPORT.

See GUARDIAN AND WARD.

#### HARMLESS ERROR.

See CRIMINAL LAW, 4.

#### HIGHWAY.

See EMINENT DOMAIN.

*New.—Removal of Fence.—Notice.—Injunction.*—The statute (section 5030, R. S. 1881) requires the supervisor, when a public highway shall have been laid out through any inclosed land, to give sixty days' notice in writing to the owner, or occupant, to remove the fence; but such owner, or occupant, shall not be compelled to remove the fence between the 1st day of April and the 1st day of November. Hence, a notice given on the 21st day of March is insufficient, the owner being entitled to sixty days' notice, independent of the time intervening between the 1st day of April and the 1st day of November; and a supervisor proceeding upon such insufficient notice to remove the fence on the 1st of November, may be enjoined.

*Conley v. Grove, 208*

#### HUSBAND AND WIFE.

See FRAUDULENT CONVEYANCE, 1, 2; PRINCIPAL AND SURETY, 7.

IMPEACHMENT OF WITNESS.

See SLANDER, 4, 5.

IMPOUNDING ANIMALS.

See ANIMALS, 2.

INDICTMENT.

See CRIMINAL LAW, 19 to 22.

INFORMATION.

See CRIMINAL LAW, 5.

INJUNCTION.

See EMINENT DOMAIN, 5; HIGHWAY; TAX SALE, 1.

INSANE PERSON.

See CONVEYANCE, 1; COUNTY COMMISSIONERS, 2.

INSTRUCTIONS TO JURY.

See EVIDENCE, 12; INTOXICATING LIQUOR, 2; JURY, 2; MUNICIPAL CORPORATION, 14; RAILROAD, 10 to 12; SPECIAL VERDICT, 2.

*To be Considered as a Whole.—Bill of Exceptions.*—Instructions must be considered as a whole, and if sought to be reviewed in the Supreme Court they must be brought into the record by a bill of exceptions, or signed by the judge, and filed as part of the record.

*Clunin v. Fagan, 304*

INSURANCE.

1. *Policy.—Condition Avoiding.*—"Vacant or Unoccupied."—The policy of insurance upon a dwelling-house was conditioned to be void if the house should become "vacant or unoccupied." The tenant moved out of the building on the 26th day of March. After her removal the parties to whom the owner had previously rented it made certain repairs on the premises, intending to move into the house on the 1st day of April. On the 30th day of March, the day the repairs were completed, the prospective tenants put some hay into the loft of a stable on the premises, and buried some potatoes on the lot near the house. The dwelling was destroyed by fire on the 31st day of March. It was unoccupied when burned, and the only articles in it were some planes left after the completion of the repairs.

*Held*, that the house was vacant within the meaning of the condition of the policy, and that the policy was void. *Continental Ins. Co. v. Kyle, 132*

2. *Action on Policy.—Notice of Loss.—Question of Fact for Jury.—Verdict.—Judgment non Obstante Verdicto.*—Where the policy of fire insurance sued on provides that the assured shall "render a particular account of the loss" as soon after the fire as possible, it is a question of fact, to be determined by the jury from all the evidence, whether the account of the loss was sent as soon as possible; and, hence, in an action on a policy for the loss of lumber destroyed by fire, where the evidence showed that the assured was a very large manufacturing company, with many departments; that it was assured in many companies, and that the president of the company, whose duty it was to make out the detailed statement of the loss, was absent a portion of the time between the date of the fire and proof of loss, the company, a general verdict, supported by evidence, having been returned for the assured, was not entitled to judgment *non obstante verdicto* merely because the particular account of the loss was not sent to the company until almost two months after the fire occurred.

*Western Assurance Co. v. Studebaker, etc., Co., 176*

3. *Same.—Lumber Destroyed.—Value.—How Determined.—Contract for Pur-*

- chase of.—Inadmissibility of.*—The value of the lumber destroyed must be determined by its market value at the time and place destroyed. A contract by the assured for the purchase of lumber to be cut in another State, to be delivered in the future, is not admissible for the purpose of showing the market price of dry lumber destroyed. *Ib.*
4. *Action on Policy.—Proof of Loss.—Waiver.*—Where an insurance company, after being notified by the insured of the loss, obtains possession of the policy and refuses to pay or adjust the loss, and so notifies the insured, proof of loss is waived by the company, and it is estopped to set up the failure to furnish proof as a breach of the policy.  
*Norwich Union F. Ins. Society v. Girtton, 217*
5. *Same.—Compromise.—Fraud.—Settlement must be Rescinded before Suit.*—Where a compromise is effected on an insurance policy, and a receipt in full executed, and the policy surrendered, while the settlement stands unrescinded, although it may have been obtained by fraud, no action can be maintained on it. The insured must at least rescind, or offer to rescind, and tender back the money received on the contract or settlement, before he can bring his suit. *Ib.*
6. *Proof of Loss.—Requirement in Policy as to.—Duty of Assured.*—The requirement in a policy of insurance that particular proof of loss shall be made under oath as soon as possible, imposes upon the insured the duty of making such proof within a reasonable time and without unnecessary delay.  
*Baker v. German F. Ins. Co., 490*
7. *Same.—Time of Making Proof.—Question of Law.*—Where there is no dispute as to the facts, whether the requirements of the policy as to time of making proof have been complied with, is a question of law for the court. *Ib.*
8. *Same.—Delay.—Non-Compliance with Conditions of Policy.*—An unexplained delay of three months and nineteen days after the fire, in making the particular proof of loss, is unreasonable, and is not a compliance with the conditions of the policy. *Ib.*
9. *Same.—Complaint.—Conditions Precedent.*—In a complaint to recover upon a policy of fire insurance, it must affirmatively appear that all conditions precedent to a right of recovery have been complied with by the insured, or an excuse for non-performance or a waiver of such conditions must appear, in order that the complaint may be held sufficient. *Ib.*
10. *Same.—Occupancy of Building.—Warranty.*—A statement inserted in the face of the policy that the building insured is "occupied as a hotel, with bar and billiard-room attached," constitutes an express warranty that the building is so occupied at the time the policy is issued, and the fact that it was not so occupied at the time the policy was issued, but was occupied instead by a saloon, constitutes a defence to an action on the policy. *Ib.*

## INTEREST.

See CONTRACT, 8.

## INTERROGATORIES TO JURY.

See INTOXICATING LIQUOR, 1; VERDICT.

*Signature of Foreman.*—Where the general verdict is signed by the foreman, with the word "foreman" affixed to the name, and the interrogatories and answers are signed in the same name, but with the word "foreman" omitted, the objection can not be maintained that the interrogatories and answers are improperly signed.

*Norwich Union F. Ins. Society v. Girtton, 217*

INTOXICATING LIQUOR.

1. *Applicant for License.—Answers to Interrogatories.—Verdict.*—Where it appears from the answers to interrogatories that the applicant for license while previously engaged in the liquor business had sold to persons in the habit of becoming intoxicated; that he did not keep an orderly house, and is not a fit person to be intrusted with the sale of intoxicating liquors, he is not entitled to a judgment on such answers. *Bronson v. Dunn, 252*
2. *Same.—Erroneous Instruction.—Reversal of Judgment.*—An instruction ascribing to intoxicating liquors qualities not known to exist as a matter of law, but which may exist as a matter of fact, is erroneous; but such instruction will not lead to a reversal of the judgment refusing a license to an applicant who is shown by facts disconnected from the subject upon which the instruction was given to be a person not fit to be intrusted with a license. *Ib.*

JUDGMENT.

See REPLEVIN, 4.

1. *Avoidance of.—Summons.—Pleading.*—In an action on a judgment rendered in favor of the plaintiff by a justice of the peace, an answer by the judgment debtor which alleges that there was not due service of process upon the defendant in the action in which the judgment was rendered, but does not aver that the record does not show due service, is bad. *Indianapolis, etc., R. W. Co. v. Harmless, 25*
2. *Same.—Summons.—Exhibit.—Pleading.*—The copy of the summons and endorsement can not be considered in aid of such answer, since it is only written instruments which constitute the foundation of the defence that can be properly made exhibits to the answer. *Ib.*
3. *Action to Set Aside.—Infancy.—Fraud.*—The plaintiffs in their complaint to set aside for fraud two certain judgments theretofore rendered against them while they were minors, alleged that in an action in which it was averred that the plaintiffs' grantor, to defraud his creditors, had conveyed certain real estate to the plaintiffs, a judgment was taken subjecting said real estate to sale to satisfy a judgment held against such grantor; that no guardian *ad litem* was appointed for them in such suit, or any appearance made by them therein; that the fact of their minority was concealed from the court, etc.; that the purchaser's assignee subsequently brought his action to quiet title; that they were personally served with process; that before the return day of the summons a guardian *ad litem* was appointed for them, now almost twenty years of age, without their knowledge or consent; that in the trial at once had the guardian admitted the averments of the complaint, and judgment was rendered quieting title.  
*Held*, that while the action of the court in rendering judgment before the appearance day was irregular, fraud is not shown, it not appearing that by any imposition upon the court it was induced to dispose of the case before the appearance day, or that plaintiffs were prevented from appearing to the action upon that day, to which, it will be presumed, they would have been permitted to make an active defence, or otherwise have been able to protect their rights. *Wilhite v. Wilhite, 226*
4. *Lien.—Prior Equities.*—The lien of a judgment creditor is subject to all the equities existing against the land at the date of the rendition of the judgment. *Whipperman v. Dunn, 349*
5. *Of Justice of Peace.—Duration of Lien.*—The lien of a judgment rendered before a justice of the peace extends ten years from the date

of the rendition of the judgment, and not ten years from the date of filing the transcript of the judgment in the clerk's office.

*Mahoney v. Neff*, 380

#### JUROR.

*Misconduct of.—What will Not Constitute.*—Where, after a jury had retired to deliberate on a verdict, and while they were going to supper in the custody of the bailiff, one of the jurors became accidentally separated from the remainder of the panel, such separation lasting ten or fifteen minutes, and the affidavit of the juror discloses that during such separation he spoke to no one but the counsel for the appellant, and no one did anything to influence his verdict, and that he was in no way influenced by such separation, and no improper conduct is charged against the juror except the mere fact of separation, a new trial will not be granted on the ground of such alleged misconduct.

*Drew v. State*, 9

#### JURY.

See ASSAULT AND BATTERY, 1; EVIDENCE, 8.

1. *Decision on Appeal.—Reading of by Counsel.—Province of Court.*—Upon the retrial of a civil cause, reversed and remanded, it is not error for the lower court to refuse to allow the decision rendered on appeal to be read to the jury, since it is the province of the trial court to determine what the law is applicable to the facts proven in the light of the ruling of the Supreme Court. *Scott v. Scott*, 66
2. *Same.—Instructions.—Discussion of.—Section 534, R. S. 1881.*—It was not error for the court to refuse to allow the discussion before the jury of instructions prepared by the court and read to counsel in advance of the argument, upon request, as provided in section 534, R. S. 1881. Under the statute, *supra*, counsel may do no more than read such instructions to the jury, and in the light thereof comment upon the facts. *Ib.*

#### JUSTICE OF THE PEACE.

See JUDGMENT, 5.

#### KIDNAPPING.

See CRIMINAL LAW, 21, 22.

#### LABORER AND EMPLOYEE.

See CORPORATION, 2.

#### LANDLORD AND TENANT.

See CRIMINAL LAW, 18.

*Denial of Landlord's Title.—Termination of Tenancy.—Notice to Quit.*—Where the tenant denies the landlord's title and asserts ownership, such a repudiation of the tenure terminates the tenancy, and a notice to quit is unnecessary. *Tobin v. Young*, 507

#### LEASE.

See CONTRACT, 10.

#### LICENSE.

See INTOXICATING LIQUOR, 1.

#### LIEN.

See JUDGMENT, 4, 5; MORTGAGE, 2; PRINCIPAL AND SURETY, 7.

#### LIFE-ESTATE.

See WILL, 5, 6.

#### MALICE.

See SLANDER, 1.

MANDAMUS.

See COUNTY SUPERINTENDENT, 7.

MEASURE OF DAMAGES.

See MUNICIPAL CORPORATION, 15; PLEADING, 11.

MERGER.

See PRINCIPAL AND SURETY, 3.

MISCONDUCT.

See JUROR.

MARRIED WOMAN.

1. *Separate Estate.—Power to Convey.*—A married woman has no power or capacity to convey or encumber her separate real estate except by a deed in which her husband shall join. Section 5117, R. S. 1881.  
*Johnson v. Jouchert, 105*
2. *Same.—Unity of Husband and Wife.—Common Law Rule as to.—How Far in Force in this State.*—The common law rule respecting the unity of husband and wife prevails to such an extent in this State as to render nugatory any attempt by a married woman to convey her separate real estate directly to her husband, unless the transaction can be sustained upon the principles of equity. *Ib.*
3. *Same.—Separate Estate.—Mortgage on.—When Valid.*—A mortgage properly executed by a married woman upon her separate real estate is a valid and binding security, unless it constitutes a contract of suretyship within the meaning of section 5119, R. S. 1881. *Ib.*
4. *Same.—Mortgage of Wife's Separate Estate to Secure Husband's Debt.—Conveyance.—Grantees.—Plea of Coverture.*—Mrs. G. attempted to convey her separate real estate to her husband by a warranty deed, in order, by such conveyance, to enable her husband to mortgage it as a security for a loan. The note of the husband, for the money borrowed, was secured by a mortgage on the land in which both husband and wife joined. The husband expended a portion of the money borrowed in the purchase of real estate, the title to which was taken in the name of his wife, and in making improvements on the land purchased for her. Afterwards the husband and wife conveyed the land mortgaged by warranty deed to S., who subsequently conveyed by like deed to J. J. and G. J.; the latter brought suit to quiet title, and to have the mortgage executed by the husband and wife cancelled.  
*Held*, that to the extent the money was expended in purchasing real estate for the wife, and making improvements thereon, the mortgage was not a contract of suretyship, but a valid encumbrance on the land when conveyed to the plaintiffs; and that, as to the residue, since the loan which the mortgage was given to secure was made to her husband, and applied to his personal use, the wife occupied the relation of surety, and the mortgage was invalid.  
*Held*, also, that the grantees, the plaintiffs, could not set up the coverture of the wife, it being a personal defence, and have the mortgage cancelled. *Ib.*
5. *Same.—Plea of Coverture.—How Far Personal Privilege.*—The plea of coverture is so far the personal privilege of a married woman, or of those who are privies in blood, or in representation with her, that before any third person can plead it in her behalf it must affirmatively appear that it is made for her benefit and with her consent, or that in equity and good conscience the person setting up the defence should be permitted to do so in order to protect a consideration



actually paid her without notice of the invalid encumbrance, or with the mutual intention and agreement that he should be permitted to set up its invalidity. *Ib.*

6. *Suretyship.—Burden of Proof.*—Where a married woman is sued upon her individual note, which is secured by a mortgage on her separate real estate, her husband joining, the burden is upon her to show her suretyship, since it will not be presumed that she occupies the relation of surety, or guarantor, but that fact must be established by affirmative evidence. *Miller v. Shields, 166*

#### MASTER AND SERVANT.

1. *Railroad.—Action against for Wrongfully Causing Death of Employee.—Complaint.—Sufficiency.*—A complaint by an administrator in an action against a railroad company for negligently causing the death of his decedent while he was engaged in repairing a tunnel on the line of the road, alleged the insufficiency of the braces of the tunnel, and its dangerous condition, and that it had long remained in such condition, the defendant knowingly allowing it to become and remain so; that the defendant, well knowing the dangerous condition of the tunnel, and that its condition was not visible by ordinary observation, ordered the deceased, who was free from fault, without warning him of the character or condition of the supports, braces or walls, or of the danger, to work at the place where he was injured and killed, and exposed him to the perils and hazards of falling timbers, stones and dirt; that the deceased was wholly without fault, and wholly ignorant of the condition or character of the tunnel, rocks, dirt and supports.

*Held*, that the complaint was not subject to the objection that it appeared therefrom that the deceased assumed the risk of the necessarily hazardous work, nor to the objection that it did not show that the danger could not have been known to the deceased by the use of ordinary diligence and care. *Louisville, etc., R. W. Co. v. Graham, 89*

2. *Same.—Special Verdict.—Judgment for Plaintiff.*—The jury in their special verdict found facts sufficient to show that the railroad company did not provide a safe place for the deceased to work; that the foreman, intrusted with the superintendency of the work, and acting for the master, had full knowledge of the dangerous character of the tunnel and the liability of the rock to fall and kill the deceased; that he might, with reasonable diligence, have guarded against the danger; that the death of the deceased was caused by the foreman's negligence, and that the deceased was without fault, and had no knowledge of the dangerous condition of the tunnel, or the crack in the rock, or its liability to fall and injure him.

*Held*, that the plaintiff was entitled to judgment. *Ib.*

3. *Same.—Respondeat Superior.*—An employer must use ordinary care and reasonable skill to make safe the place where he requires his employees to work. This duty the employer can not delegate, and he can not escape responsibility by delegating the duty of looking after and providing a safe place to any other person. If the employer delegates such duty to another, such person acts for the employer, and if such duty is negligently performed the employer is responsible. *Ib.*

4. *Same.—Foreman in Charge of Work.—Fellow-Servants.*—A foreman intrusted with exclusive control of work, and of providing a safe place for employees to work, acts in the discharge of such duty for the master, and is not a fellow-servant of one injured through his negligence in failing to provide a safe place for him to work, and the railroad company is liable. *Ib.*

5. *Injury to Employee in Gravel Pit.—Assumption of Risk.*—Where an employee at work in a gravel pit, while engaged in digging a bed of gravel from under a thin stratum of clay is injured by the falling of the clay, there can be no recovery from the master. The employee in such a case takes upon himself the dangers incident to the work, and is bound to know that when the earth is undermined it will fall in. *Griffin v. Ohio, etc., R. W. Co., 326*
6. *Injury to Contractor's Employees.—Liability of Principal.*—One who lets a contract to another to do a particular work, reserving to himself no control over the manner in which the work shall be performed, except that it shall conform to a particular standard when completed, is not liable for any injury which may occur to others by reason of any negligence of the person to whom the contract is let. *Vincennes, etc., Co. v. White, 376*
7. *Same.—Visible Risk.—Assumption of.*—An employee injured by the caving in of a ditch which he is assisting to construct through a soil composed largely of sand and gravel, can not recover for such injury, since the liability of the trench to cave in, and the danger, are alike open to the observation of all parties. *Ib.*
8. *Assumption of Risk.—Pleading.*—An employee can not recover from the employer for an injury produced by some cause incident to the nature of his services, and the master is not responsible for the known risks incident to the service in which the servant engages. In such a case, in order to make a good complaint, it must be averred that the plaintiff had no knowledge of the danger. An allegation that the plaintiff was free from fault does not take the place of averments showing that the risk was not one knowingly assumed as an incident of his service. *Louisville, etc., R. W. Co. v. Corps, 427*

## MORTGAGE.

See MARRIED WOMAN, 3, 4.

1. *Permanent Improvements by Mortgagee.—Recovery for.—Repairs.*—Where one goes into possession of land under a deed absolute upon its face, but which is, in fact, a mortgage, believing, in good faith, that he is the owner of the land, and makes permanent improvements thereon, he is not entitled to recover for the value of the improvements, but may recover for the value of repairs. *Miller v. Curry, 48*
2. *Priority of Liens.—Subrogation.*—B., the plaintiff, took a conveyance from G. of land subject to a school fund mortgage, which had been foreclosed, agreeing to redeem from the sale which had been made, and to pay certain judgments against the owner. On compliance with certain named conditions G. was to retain possession of the land, for which he had given an absolute deed to B., and it was agreed that if G. should sell the land for an amount sufficient to pay the sums expended by B., with interest, B. should reconvey the land. The defendant, although when the arrangement was made he had a mortgage lien which was superior to the judgment liens, and the payment of the money otherwise expended, urged B. to make the arrangement and to redeem the land, informing B., who had no notice to the contrary, that he had no demands against it. B. relied upon the representations, believing them to be true, and acted upon them, taking a conveyance and making the agreement as above stated. *Held*, that B. was entitled to be subrogated to the lien of the school fund mortgage, the defendant being estopped to set up his mortgage. *Bunting v. Gilmore, 118*
3. *Same.—Exhibit not Properly Part of Complaint.—Description in Complaint Controls.*—Where the description of the land in an exhibit not prop-

erly a part of the complaint, differs from the description in the complaint, the complaint will control. *Ib.*

4. *Foreclosure.—Description.—Cross-Complaint.*—A cross-complaint which refers to the complaint for a description of the real estate upon which the mortgage is sought to be foreclosed is sufficient as against an assignment of error. *Loeb v. Tinkler, 331*
5. *Same.—Strict Foreclosure.—Junior Judgment.—Purchaser Under.*—The purchaser under the foreclosure of a senior mortgage is entitled to a strict foreclosure as against the wives of purchasers at a sale on execution issued on a judgment junior to the mortgage, who were not made parties to the foreclosure. *Ib.*
6. *Sheriff's Sale.—Assignment by Mortgagee of Certificate of Purchase.—Rights of Assignee.*—Where a mortgagee who holds a certificate of purchase of the mortgaged premises, sells and assigns the certificate, the assignee thereof acquires all the rights of the assignor under the certificate, and his title to the debts secured by the mortgage, and the fact that the assignee does not pay the full amount of the purchase-money does not prevent the title from passing to the assignee. Hence the assignor can not, after the year of redemption has expired and a deed has been issued to the assignee, maintain an action for the reformation and foreclosure of the mortgage. *Whippman v. Dunn, 349*
7. *Foreclosure.—Sheriff's Deed.—Description.*—Where the land sold in pursuance of a decree of foreclosure is described in the decree and deed as a certain twenty-acre tract of land, "except such portions \* \* as have heretofore been laid out in town lots, \* \* and have been sold and conveyed prior to the execution of the mortgage," the deed is void for uncertainty, since it would be necessary in order to determine what property was in fact sold to institute an extraneous inquiry. *Bowen v. Wickersham, 404*
8. *Acquisition of to Perfect Title.—Endorser and Endorsee.—Foreclosure.—Estoppel.*—A party who acquires a mortgage for the purpose of perfecting a title for which he has previously bargained does not occupy the position of an ordinary endorsee. He occupies no better position than his assignors, and if their acts and representations worked an estoppel against them the estoppel operates against the assignees. *Maxon v. Lane, 592*
9. *Same.—Representations Whereby Another is Induced to Change His Position.—Estoppel.*—If a party who holds a mortgage declares it to be invalid or agrees not to enforce it, or makes representations or does acts whereby another is induced to change his position and expend money, he is estopped by such representations and acts, whether fraudulent or not, to foreclose the mortgage. *Ib.*

#### MUNICIPAL CORPORATION.

1. *Town.—Opening of Street.—Commissioners' Report.—Acceptance of by Trustees.—Parol Evidence.*—Where the record of the board of trustees shows that a proper petition praying for the opening of a street was filed; that commissioners were duly appointed to assess benefits and damages, and that the commissioners made and filed their report with the town clerk, but fails to show that the board accepted the report within twenty days, or that any further action was taken by that body in opening the street, it is incompetent to prove by parol that the board of trustees accepted the report within the time prescribed, and that it determined to make the appropriation of the land therein described. *Byer v. Town of New Castle, 86*
2. *Same.—Act of Municipal Body.—Competent Evidence of.*—The only competent evidence of any act or proceeding of a municipal body upon

which the members of the corporate board are required to vote, is the record of the proceedings. *Ib.*

3. *Street Improvement.—Barrett Law.—Notice.—Committee to Hear Objections.*—Section 2 of the act of March 8th, 1889, entitled "An act concerning powers and duties of cities and incorporated towns, \* \* \* providing the mode and manner of making street and alley improvements," etc., which provides for notice to the property-owners of the time and place where they may make objection to the necessity of the improvement contemplated, does not require the appointment of a committee to hear the objections, or that there should be any determination of the rights of the objectors. It simply contemplates that no action shall be taken by the common council after resolving to make the improvement until notice is given, and an opportunity afforded the property-owners to present for the consideration of the council such objections as they may make to the necessity for the construction of the work. This object is accomplished by requiring objections to be filed with the clerk to be by him laid before the common council. *Quill v. City of Indianapolis, 292*
4. *Same.—Constitutional Inhibition Limiting Indebtedness of Cities.—Bonds Issued in Pursuance of Barrett Law not Indebtedness Within.*—Bonds or certificates issued in pursuance of the provisions of the act, do not create an indebtedness within the inhibition of article 13 of the Constitution, declaring that no municipal corporation shall become indebted to an amount in excess of two per cent. of its taxable property. The bonds issued by the city for the purpose of raising money with which to pay for the improvement, or issued to the contractor in payment for the work, bear the name of the street or alley improved or sewer constructed, and are payable out of the special street improvement fund to be accumulated from assessments made against the property benefited; and hence no indebtedness arises against the city. *Ib.*
5. *Same.—Debt.—Essentials of.*—It is essential to the idea of a debt that an obligation should have arisen out of a contract, express or implied, which entitles the holder thereof unconditionally to receive from the promisor a sum of money which the latter is under a legal or moral duty to pay without regard to any future contingency. *Ib.*
6. *Same.—Assessments.—How Upheld.*—Assessments for street improvements are upheld on the ground that the adjacent property upon which the cost of the improvement is assessed is enhanced in value to an amount equal to the sum assessed against it, and that the owners have received peculiar benefits which the citizens do not share in common. The municipality, as such, is not benefited by the improvement, and there is, hence, under the law in question, neither a legal nor moral obligation to pay. *Ib.*
7. *Same.—Street and Alley Crossings.—Improvement of.—Payment in Cash by City.*—The municipal corporation becomes liable to pay in cash the expense for so much of street and alley improvements as shall be occupied by the street and alley crossings, upon the completion and final estimate of the work, and hence no debt results from such improvement. *Ib.*
8. *Same.—Waiver of Irregularities in Assessment.—Provision Relating to.—Constitutionality of.*—A property-owner who, in consideration of the right to pay his assessment in semi-annual instalments, has agreed that he will waive all irregularities in the assessment, can not question the validity of the provision of the act that "no suit shall lie to restrain or enjoin the collection of such assessment," and that the validity of such assessment shall not be questioned. Such provision applies only to those persons who, in consideration of their right to pay their as-

assessments in semi-annual instalments, agree in a writing, to be filed with the city clerk, that they will not make any objection to the legality or regularity of their respective assessments, and is constitutional. *Ib.*

9. *Defective Sidewalk.—Duty of City to Keep in Repair.—Complaint.*—In an action against a city for damages for injuries caused by a defective sidewalk, an allegation that the city had exclusive authority and jurisdiction over its streets, alleys and sidewalks, and negligently permitted one of its sidewalks—the one on the west side of Washington street—to get out of repair, is sufficient to show that the sidewalk where the injury is alleged to have occurred was within the city and under its jurisdiction. *City of Columbus v. Strassner, 482*
10. *Same.—Complaint Negating Contributory Negligence.—Sufficiency of.*—Where the complaint alleges that the injury occurred without the fault of the plaintiff it will be sustained, unless it clearly appears from the facts specifically stated that there was negligence on the part of the plaintiff which contributed to the injury. *Ib.*
11. *Same.—Contributory Negligence.*—Where the question of contributory negligence is a controverted one, it is a question of fact for the jury, and their verdict will not be disturbed if there is evidence to support it. *Ib.*
12. *Same.—Injury Caused by Defective Sidewalk.—Extent of.—Evidence.—Cross-Examination.*—The question "I will ask you if you didn't go to Mrs. Williams, your sister-in-law's, and if you didn't strike her daughter over the head with a crutch and knock her down on the floor," was a proper question to be asked on cross-examination as tending to contradict the plaintiff's evidence in chief, and to show the plaintiff's injury was not so great as claimed. The defendant was not required to make the proof by its own witnesses, but had the right to elicit the testimony from the plaintiff. *Ib.*
13. *Same.—Knowledge of Defective Sidewalk.—Right of Action.*—Where one suffers an injury occasioned by a defective sidewalk, the mere fact that before the accident happened he knew of such defect does not deprive him of his right of action. The fact that he had knowledge of the defect, with all the other facts bearing on the question, is to be considered by the jury in determining whether he was guilty of contributory negligence. *Ib.*
14. *Same.—Notice to Councilman.—Instruction to Jury.*—It was not error to instruct the jury that notice to a councilman of a defective sidewalk was notice to the city. *Ib.*
15. *Same.—Measure of Damages.—"Lack of Personal Enjoyment."*—An instruction to the jury that they should consider in measuring the damages any "lack of personal enjoyment" occasioned by the injury, was erroneous. *Ib.*

#### NEGLIGENCE.

See COUNTY CLERK, 2; MUNICIPAL CORPORATION, 10, 11; RAILROAD, 4 to 6, 8, 10, 11.

*Contributory.—What Constitutes.—Falling into Unguarded Ditch.*—It can not be said, as a matter of law, that one who runs to a fire, on a dark night, on the streets of a city, to assist in extinguishing it, falling into an open ditch and receiving an injury, is guilty of contributory negligence. In the absence of some notice to the contrary he had the right to presume that the streets were in a reasonably safe condition. *Noblesville, etc., Co. v. Lochr, 79*

## NEW TRIAL.

See CRIMINAL LAW, 7; SPECIAL FINDING, 1.

1. *Excessive Damages.—Practice.*—An assignment as a cause for a new trial that the damages assessed are excessive applies only to actions for tort, and is not applicable to actions on contract.  
*Western Assurance Co. v. Studebaker, etc., Co., 176*
2. *Newly Discovered Evidence.—Slander.*—In an action for slander, a new trial should not be granted the defendant on the ground of newly-discovered evidence where the evidence alleged to have been discovered is of an act of unchastity committed long after the slanderous words were published.  
*Miller v. Cook, 238*
3. *Same.*—Newly discovered evidence, to authorize a new trial, should be of such a character as to render it probable that a second trial would result differently from the first.  
*Ib.*
4. *When will be Ordered.*—Where it appears that justice can not be done between the parties without a new trial as to the whole case, the court will order a new trial of all the issues.  
*Whipperman v. Dunn, 349*

## NEWLY DISCOVERED EVIDENCE.

See NEW TRIAL, 2, 3.

## NON-RESIDENT.

See POOR PERSON.

## NOTICE.

See DEPOSITION, 2; GUARDIAN AND WARD; HIGHWAY; INSURANCE, 2; LANDLORD AND TENANT; MUNICIPAL CORPORATION, 3, 14; PLEADING, 8.

## OFFICE AND OFFICER.

See COUNTY SUPERINTENDENT.

1. *Executive Appointment Before Vacancy.—Surrender of Office by Incumbent.*—An appointment made by the Governor to an office rightfully held at the time of the appointment by an incumbent, whose term has not expired, is void. The surrender of the office to the appointee by such incumbent does not validate his void appointment, nor can any future act of the Governor validate such appointment.  
*State, ex rel., Worrell, v. Peelle, 515*
2. *Same.—Chief of Bureau of Statistics.—Certificate of Election by Legislature.—Governor's Commission.*—The General Assembly, assuming to divest the Governor of the power to appoint the chief of the bureau of statistics, in contravention of the Constitution, itself elected such officer. Upon his election, a certificate thereof having been presented to the Governor, the Governor issued to him a commission in which was recited the nature of his title, and that he was commissioned as the elect of the General Assembly. It further appeared by the records of the executive office that the commission was issued because of the election by the General Assembly.  
*Held*, that the issuing of the certificate was not the exercise of the appointing power, and conferred no title to the office.  
*Ib.*
3. *Same.—Records of Governor's Office.—Evidence.*—The records of the Governor's office mentioned above are competent evidence in a suit by a subsequent appointee of the Governor contesting the right of such person commissioned by the Governor to hold the office.  
*Ib.*
4. *Same.—Appointee of Legislature under Void Election.—Governor's Commission.—Effect of.*—A commission issued by the Governor to an appointee of the Legislature under a void election, which recites that it is issued because of such election, can not be given the effect of an

executive appointment upon the theory that all persons being presumed to know the law, the Governor knew that the sole power of appointment was possessed by him, and not by the Legislature, at the time of the issuing of the commission. *Id.*

5. *Same.*—A commission by the Governor to an officer, which recites that the person commissioned derives his claim of title because of an election by the Legislature, and is commissioned because thereof, is conclusive that such person is not the Governor's appointee. *Id.*

#### OFFICIAL BOND.

See CITY TREASURER; COUNTY SUPERINTENDENT, 1, 3, 4, 6, 7.

#### OUSTER OF OFFICER.

See COUNTY SUPERINTENDENT, 5, 6.

#### OUTSTANDING TITLE.

See SCHOOL LANDS, 1.

#### PARDON.

See CONVICT.

#### PAROLE.

See CONVICT.

#### PARTIES.

See TOWNSHIP, 3.

#### PARTNERSHIP.

*Property Kept for Carrying on the Business.—Sale of.*—Where the property of a partnership is kept for the purpose of carrying on a particular business, neither partner has the right to sell the entire property, the power of sale being confined to those things kept for sale.

*Lowman v. Sheets, 416*

#### PAYMENT.

*Delay in Presenting Claim.—Presumption.*—A delay of almost twenty years in presenting a claim, taken in connection with other circumstances, was properly treated as creating a presumption that the money deposited with the defendants had been repaid. *Long v. Straus, 84*

#### PERJURY.

See CRIMINAL LAW, 1 to 3.

#### PLEADING.

See ANIMALS, 1; ASSAULT AND BATTERY, 2, 3; BILL OF EXCHANGE; COMMON CARRIER, 1; CONVEYANCE, 2; CORPORATION, 3; DECEDENTS' ESTATES, 1; DRAINAGE, 6; INSURANCE, 9; JUDGMENT, 1, 2; MASTER AND SERVANT, 8; MORTGAGE, 3, 4; MUNICIPAL CORPORATION, 9, 10; PRINCIPAL AND SURETY, 1, 4; PROMISSORY NOTE; QUIETING TITLE; RAILROAD, 5; REPLEVIN, 6, 7; TAX SALE, 1.

1. *Action against Endorser.—Sufficiency of Complaint.*—A pleading which shows that the defendant endorsed in writing and assigned to the plaintiffs the note of an insolvent maker, is sufficient to charge him with liability on the endorsement. *Smythe v. Scott, 183*
2. *Same.—Endorsement.—Non-Liability of Endorser by Agreement.—Answer Alleging.—Reply.*—In an action against an endorser, where the answer alleges that the endorsement was made without consideration, and that the defendant simply lent the money as an agent of the plaintiffs, and under an agreement that he should not be liable if the borrower proved insolvent, a reply averring there was a consideration

for the endorsement does not avoid all the allegations of the answer, and is bad. *Ib.*

3. *Same.—Complaint.—Sufficiency of.*—An averment in the complaint that the defendant received a large sum of money as the treasurer of the plaintiffs, and that "although he has often been requested so to do, has failed and refused to account for and pay over said money," is a sufficient allegation that the defendant is indebted to the plaintiffs, and that the debt is unpaid. *Ib.*

4. *Demurrer.*—A demurrer to a complaint assigning for cause that the complaint does not state facts sufficient to constitute a cause of action, does not present the question of the sufficiency of the complaint on the ground of another action pending.

*Williams v. Lewis, 344*

5. *Demurrer.—Defect of Parties.*—A demurrer on the ground that a cross-complaint does not state facts sufficient to constitute a cause of action presents no question as to defect of parties.

*Whipperman v. Dunn, 349*

6. *Paragraph of Complaint.—Questioning of by Assignment of Error.*—An attack upon one of several paragraphs of a complaint made for the first time in the assignment of errors will be unavailing, even though the paragraph assailed may be radically defective.

*Louisville, etc., R. W. Co. v. Corps, 427*

7. *Must Proceed on Particular Theory.*—A pleading must rest upon some particular theory, and be sufficient upon that theory.

*Trentman v. Neff, 503*

8. *Notice by Publication.—General Appearance.—Amended Complaint.*—Where a defendant, who has been notified by publication, enters a general appearance, the trial court may permit the filing of an amended complaint which relates to the same transaction and sets up substantially the same facts embraced in the original complaint.

*Nyssewander v. Lowman, 584*

9. *Same.—Appearance.—Due Process of Law.*—Where a notice, whatever its character, brings a defendant into court, secures an appearance and gives an adequate opportunity to the defendant to be heard, there is due process of law, and objections are unavailing. *Ib.*

10. *Same.—Action for Damages.—Fraudulent Representations as to Value of Stock.—Complaint.—Sufficiency of Against Demurrer.*—A complaint alleged that the plaintiff exchanged land with the defendant for shares of the capital stock of a corporation of which the defendant was president; that the defendant knew the financial condition of the corporation and the value of its capital stock; that for the purpose of defrauding the plaintiff, and to induce him to accept the stock, the defendant represented that the financial condition of the corporation was good, and that its capital stock was of par value; that for the purpose of preventing the plaintiff from ascertaining the condition of the corporation and the value of its capital stock, the defendant fraudulently requested the plaintiff to make no inquiries as to the financial condition of the company, or as to the value of its capital stock, for the reason that he did not want other stockholders to know that he was selling his stock; that the plaintiff, relying upon the representations of the defendant, exchanged his land for the stock; that the defendant knew at the time of making the representations that the corporation was insolvent and its capital stock worthless.

*Held*, that the complaint states a cause of action for damages caused by fraudulent representations, and is good against demurrer. *Ib.*

11. *Same.—Measure of Damages.—Complaint.*—The measure of damages is the difference between the actual value of the corporate stock and its



value had it been as represented by the defendant, and not the value of the land exchanged for the stock; and hence the complaint is not bad for failing to state specifically the value of the land exchanged for the stock. *Ib.*

12. *Same.*—*Facts Pled by way of Recital.*—*Demurrer.*—Facts must be pleaded directly and positively, and it avails nothing as against a demurrer to plead them by way of recital. *Ib.*

#### POOR PERSON.

1. *Application to be Admitted to Prosecute.*—*Refusal.*—*Discretion of Court.*—It is only where there is a clear case of abuse of discretion on the part of the trial court in refusing an application to be admitted to prosecute an action as a poor person that its judgment will be reversed. *Hoey v. McCarthy, 464*
2. *Same.*—*Non-Resident.*—*Cost Bond.*—Where such an application is denied a non-resident it is not error, upon the refusal of the plaintiff to file the bond for costs required by the statute (section 589, R. S. 1881), without any additional showing as to the claim, or inability to give the bond, to dismiss the complaint. *Ib.*

#### POOR PERSON, PROSECUTION BY.

See POOR PERSON.

#### POSSESSION.

See REAL ESTATE, ACTION TO RECOVER.

#### PRACTICE.

See ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS; CRIMINAL LAW, 5; INSTRUCTIONS TO JURY; NEW TRIAL, 1; SPECIAL FINDING, 1.

1. *Rejection of Evidence.*—Where the court is requested to strike out the testimony of a witness, but no reason for its rejection is shown at the time the request is made, no question is presented to the Supreme Court upon a ruling of the court denying the request. *Bernhamer v. Dawson, 186*
2. *Motions to Strike Out Pleadings.*—*Bill of Exceptions.*—Motions to strike out pleadings and to separate and number paragraphs of pleading, and the rulings thereon, must be brought into the record by a proper bill of exceptions or be made a part of the record by order of the court. *Balue v. Richardson, 480*

#### PRESUMPTION.

See PAYMENT; SETTLEMENT.

#### PRINCIPAL AND SURETY.

See COUNTY CLERK; VENDOR AND PURCHASER, 1.

1. *Cross-Complaint.*—*Sufficiency of.*—*Statute.*—In an action upon a note and to foreclose a mortgage executed to secure it, a cross-complaint which alleges that the defendant executed the note and mortgage as the surety of the co-defendant and demands that the interest of the co-defendant be first sold before the sale of any of the property of the cross-complainant, is good under section 1212, R. S. 1881, relating to the rights of sureties. *Chaplin v. Baker, 385*
2. *Same.*—*Assumption of Liability by Surety.*—An answer to such cross-complaint which alleges that the cross-complainant agreed with the plaintiff and his co-defendant to pay and satisfy the note and mortgage, is good. *Ib.*
3. *Same.*—*Parol Negotiations.*—*Merger.*—Where a contract has finally been reduced to writing, all previous parol negotiations are merged in the written contract. Where therefore land has been conveyed by war-

- ranty deed, a prior parol agreement to satisfy an encumbrance upon the land is ineffectual for any purpose as an agreement. *Ib.*
4. *Same.—Pleading.—Departure.*—In an action upon a promissory note where one of the defendants, a married woman, alleges her suretyship, a reply which attempts to show a liability upon a subsequent undertaking is a departure, and is bad. *Ib.*
  5. *Same.—Change of Relative Position.*—Where a surety for a valuable consideration agrees with the principal to pay the joint indebtedness, he thereby becomes the principal and the principal becomes his surety. *Ib.*
  6. *Judgment not Disclosing Suretyship.—Subrogation.*—A judgment was rendered against S. and H. before a justice of the peace and a lien obtained upon the real estate by the filing of a transcript. S. afterwards mortgaged the land to Y. to secure a debt. The mortgage was foreclosed, Y. becoming the purchaser at the sheriff's sale. The judgment obtained against S. and H. did not disclose H.'s suretyship, and Y. had no knowledge that he was surety. H. having paid the judgment after the mortgage was given, sought to have himself declared a surety and subrogated to the lien of the judgment creditor.  
*Held*, that as against Y., to whom the mortgage was given after the rendition of the judgment and before its payment, he is not entitled to subrogation. *Smith v. Harbin, 434*
  7. *Real Estate.—Purchase-Money.—Equitable Lien.—Parol Agreement.—Husband and Wife.*—D. W. agreed with J. W. that if the latter would become his surety in borrowing money with which to make the first payment on real estate for which he had bargained, he should have a lien thereon to secure him from loss as such surety. The real estate was purchased, the borrowed money expended in making the first payment, and with the knowledge and consent of the surety the conveyance was made to the wife of D. W. The principal failing to pay the note the surety finally executed his own note in satisfaction thereof. The remainder of the purchase-money was paid by the wife. The first payment by D. W. was on a debt he owed his wife. The wife, at the time of taking the conveyance, had knowledge of all the facts above stated, but did not know of the verbal agreement as to the lien.  
*Held*, disregarding the verbal agreement, which is ineffectual to create a lien by contract, that the surety, whose position is that of a general creditor, has no equitable lien upon the real estate on account of his payment of the note. *Wood v. Wood, 545*

#### PROMISSORY NOTE.

See FRAUDULENT CONVEYANCE, 2; REPLEVIN, 2; TOWNSHIP, 2, 5.

1. *Consideration.—Parol Evidence to Show.—Pleading.—Answer.—Sufficiency of.*—A husband and wife wishing to procure a home applied to the uncle of the wife, a bachelor, who was on intimate terms with the family, and from whom he had received many kindnesses, for money with which to make the cash payment. He first gave them one thousand dollars, which was applied as a cash payment on the land, two notes for seven hundred and fifty dollars each being given for the remainder of the purchase-money; and afterwards he gave them fifteen hundred dollars more with which to purchase said notes. It was agreed with the donor, when the money was delivered, that the principal should never be repaid, but that the donor should be paid an annuity equal to the interest on the sums donated during his natural life. To secure this promise on the part of the husband and wife a note for one thousand dollars was executed to the donor, and the notes purchased were also assigned to him. All the notes were secured by mortgages on

the land. An action was brought on the notes by the administrator after the donor's death, and the facts as above were stated in the answer as a defence.

*Held*, that the answer states a good defence to the action; and as the money advanced did not constitute the consideration of the note, that evidence to prove the averments in the answer, such evidence going to the consideration of the notes, was admissible, and was not a violation of the rule prohibiting the admission of parol evidence to contradict a written instrument. *Dowden v. Wood, 233*

2. *Endorsement.—Complaint.*—The payee of a promissory note wrote upon the back thereof the words: "I sign this note to N. H. Garretson without recourse," and affixed his signature. Garretson wrote upon the back of the note these words: "I guarantee payment of this note when due to John F. Brotherton," his signature following the words, and Brotherton wrote thereon the words: "I guarantee payment of this note when due to the First National Bank of Lima, Ohio," and attached his signature.

*Held*, that the endorsement by the payee, notwithstanding the misuse of words, was sufficient to pass title to Garretson.

*Held*, also, that a complaint by Brotherton alleging the facts as above is bad, as it does not show title in the plaintiff. *Brotherton v. Street, 599*

#### PROOF OF LOSS.

See INSURANCE, 4, 6 to 8.

#### PROSECUTING ATTORNEY.

See CRIMINAL LAW, 7.

#### PUBLIC POLICY.

See EMINENT DOMAIN, 5.

#### QUANTUM MERUIT.

See COUNTY COMMISSIONERS, 2.

#### QUIETING TITLE.

1. *Disclaimer.—Pleading.*—In an action to quiet title it is not error to overrule a demurrer to an answer by the defendants, who are not in possession, which disclaims any interest in the real estate in controversy and alleges that the defendants had never claimed any interest in the land. *Miller v. Curry, 48*
2. *Pleading.*—In an action to quiet title, a general allegation that the defendants assert an unfounded title is sufficient to show that a claim of title is asserted by them. *Wilson v. Wilson, 472*

#### RAILROAD.

See CORPORATION, 4; MASTER AND SERVANT, 1, 2.

1. *Injury to Animals.—Construction of Cattle-Guards.—Opinion Evidence.*—In an action to recover for the value of horses killed on the track of a railroad, the opinion of an expert witness that the construction of a cattle-guard under the track at the place where the horses entered upon it would render the use of the tracks dangerous, is inadmissible. *Chicago, etc., R. R. Co. v. Modest, 212*
2. *Same.—Maintaining Fence.—Burden of Proof.*—In such action the burden is upon the defendant to show affirmatively that the place where the animals entered was one that it could not fence without endangering the safety of its employees. *Id.*
3. *Fire from Passing Engine.—Negligence.—Liability of Company.*—Where a railway company negligently permits dry grass and other combustible matter to accumulate upon its right of way, and they are set on fire by

passing engines, and the fire is negligently permitted to escape to the land of an adjoining owner, without negligence on his part, the company is liable. *Chicago, etc., R. W. Co. v. Burger*, 276

4. *Same.—Contributory Negligence.*—It is not contributory negligence for the adjacent owner to permit dry grass and stubble on his land which will spread fires negligently set by the railway company. *Ib.*
5. *Same.—Complaint.—Special Verdict.—Theory Proceeded on.—Judgment.*—Where the complaint proceeds upon the theory that the plaintiff's injury was caused by the negligence of the defendant in permitting rubbish, and other combustible matter, to accumulate on its right of way from which the fire escaped to the land of the plaintiff; while the verdict rests upon the theory that the injury was occasioned by the negligence of the company in failing to provide its engines with proper spark-arresters, a judgment for the plaintiff based thereon will not be sustained. *Ib.*
6. *Same.—Special Verdict.—Finding of Negligence.—Mere Conclusion.*—A special verdict should state facts, not conclusions. A finding that one of the parties has been guilty of negligence is a mere statement of a conclusion, and will not support a judgment. *Ib.*
7. *Accident at Crossing.—Evidence.—Res Gestæ.*—In an action for injuries sustained at a railroad crossing by collision with a train, it was competent for the plaintiff's mother, who was present when her husband and daughter left home on the evening of the accident, to testify as to what was said as to their destination when about to depart, such evidence being a part of the *res gestæ*.  
*Cincinnati, etc., R. W. Co. v. Howard*, 280
8. *Same.—Injury by Collision with Train at Crossing.—Contributory Negligence.—Burden on Injured Party.*—Where a party crossing a railroad track is injured by a collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury. *Ib.*
9. *Same.—Vigilance.—Burden of Proof.—Train Making up Time.*—The burden is on one injured by a collision with a train at a railroad crossing to show by a preponderance of the evidence that he vigilantly used his eyes and ears to ascertain if a train of cars was approaching. The fact that the train is behind time, and is running faster than usual at the crossing, does not excuse him from exercising the care and caution required of him when the train is running at its usual rate. *Ib.*
10. *Same.—Erroneous Instruction.—Obstruction of View.—Failure to Give Signals.—Contributory Negligence.*—It was error to instruct the jury that if the view was obstructed and there was a failure to ring the bell or sound the whistle within eighty rods of the crossing, they might infer want of contributory negligence in attempting to cross the railroad track under any circumstances which would have made it reasonably safe on the supposition that the engine and train were eighty rods away. *Ib.*
11. *Same.—Instruction.—Contributory Negligence.—Inference to be Drawn by Jury.*—An instruction that if the whistle was not sounded nor the bell rung this was a circumstance tending to show want of contributory negligence is erroneous; as, also, is an instruction that if there is nothing in the evidence tending to show contributory negligence the jury may, without proof, infer there was none. *Ib.*
12. *Same.—Instruction.—Care Required in Case of Obstruction to Sight or Hearing.*—It is proper to instruct the jury that if there were any obstructions to sight or hearing in the direction of the approaching train as

the plaintiff neared the crossing, the obstructions required increased care on the part of the plaintiff in approaching the crossing. The care must be in proportion to the increase of danger that may come from the use of a highway at such a place. *Id.*

13. *Injury to Animals where Company is not Required to Fence.—Non-Liability.*—A railroad company is not liable for injuries to animals that enter upon its track at places where to maintain fences would interfere with the discharge of its duty to the public, or with the rights of the public in the use of the highway, or in doing business with the company, nor at any place where fences and connecting cattle-guards would make the running and handling of trains, or the necessary and proper switching of cars, more hazardous to its employees. Where animals enter upon railroad grounds at such places and are killed within limits that can not be and are not required to be fenced, the company is not liable. *Pennsylvania Co. v. Mitchell, 473*
14. *Same.*—Railroad companies can not be required to erect and maintain fences along uninclosed and unimproved lands, nor in the platted portions of cities, towns and villages, but they are, nevertheless, liable for injury to animals that enter upon their tracks at such places, in case the track was not, but might have been, securely fenced without interfering with the discharge of its duty to the public, or without increasing the danger to its employees in the discharge of their duties. *Id.*
15. *Same.—Maintenance of Cattle-Guards.—Opinion Evidence.—Inadmissibility of.*—It was not error to exclude the evidence of a witness whose opinion was asked as to whether or not a cattle-guard could have been maintained at a particular place without increasing the danger to the defendant's trainmen. That was a conclusion for the jury to draw from all the evidence in the case. *Id.*

#### REAL ESTATE.

See PRINCIPAL AND SURETY, 7; STATUTE OF FRAUDS.

1. *Broker.—Commission.—Contract of Agency.—Construction of.*—A contract of agency for the sale of land provided for a broker's commission of 5 per cent. on the amount of the consideration. It was further provided that "If said real estate is transferred, or sold, outside of the influence or agency of said Leslie, or withdrawn from the market within twelve months from this date I agree to pay said Leslie a commission of 2 per cent. If a customer is introduced through the agency of said Leslie, and a sale is afterwards consummated with said customer I agree to pay the commission aforementioned, whether the time of this agreement shall have expired or not."  
*Held*, that the principal had the right to withdraw his real estate from the market, or to sell it to a purchaser not furnished by the agent, in which case he would have been liable for a commission of 2 per cent.; but that having done neither, and having sold to a purchaser furnished by the agent after the expiration of a year, he was liable for the commission of 5 per cent., the contract being a continuing one until terminated in some manner provided for by the contract. *Leslie v. Boyd, 320*
2. *Deed.—Description.*—Real estate was conveyed by the following description: "One-eighth of the undivided one hundred and forty-one and one-half acres of land, known as the 'Old John Whiteneck farm,' in Waltz township, Wabash county, State of Indiana, to wit: Reserve No. 4, section 31, township 26 north, of range 7 and 6."  
*Held*, that the description was not void for uncertainty, it appearing from the evidence that the grantor owned an undivided one-eighth interest in one hundred and forty-one and one-half acres of land in said re-

serve, and that the one hundred and forty-one and one-half acres was known as the "Old John Whiteneck farm." *Trentman v. Neff*, 503

#### REAL ESTATE, ACTION TO RECOVER.

1. *Title by Possession*.—Where a complaint to recover real estate alleges title in fee in the plaintiff, and the facts found in the special verdict show title through possession continued for the requisite period by the ancestor of the plaintiff's grantor, and heirs, the allegation of the complaint is supported, a title in fee is shown.

*McWhorter v. Heltzell*, 129

2. *Same*.—*Title Traced to Common Source*.—Where title is claimed through a common grantor, it is sufficient to trace it to that source. *Ib.*
3. *Same*.—*Election to Sue for Damages*.—*Condition Broken*.—Where one elects to sue for damages and accepts judgment, he is precluded from entering for condition broken. *Ib.*

4. *Sheriff's Sale*.—*Deed*.—*Insufficient Description*.—In order to maintain ejectment, the burden is upon the plaintiff to make out a title to the land in dispute in himself, and where he claims through a judicial sale it must appear from the decree and deed, through which he claims, without the aid of extrinsic evidence, that the title to the lot in controversy is in him. If the decree and deed are so defective that it can not be ascertained by inspection, or from any data contained therein, what property was in fact sold, or if in order to ascertain the intention of the officer in selling, it becomes necessary to institute an extraneous inquiry, the deed is void.

*Bowen v. Wickersham*, 404

#### RECOGNIZANCE.

1. *Default*.—*Judgment of Forfeiture*.—In order to maintain an action upon a recognizance bond it is necessary that the court should enter a formal judgment of forfeiture at the same term of the default. A judgment of forfeiture entered at a subsequent term is void. The fact that the recognizance is a continuing one does not alter the rule.

*McGuire v. State*, 536

2. *Same*.—*Evidence*.—In such action, where the only evidence introduced is the bond, the entry of default and judgment of forfeiture, no evidence being introduced showing the bond to have been executed by the order of the circuit court, or that a criminal proceeding was pending against the defendant at the time the bond was executed, a finding adverse to the defendants is not sustained. *Ib.*

#### REDEMPTION.

See TAX SALE, 3.

#### REMEDIES.

See CONTRACT, 15, 16.

#### REPLEVIN.

1. *Action upon Bond*.—*Pleading*.—In an action upon a replevin bond, where the answer alleges that the question of title was not in issue in the replevin suit, it is a harmless error to sustain a motion to strike out a part of the cross-complaint in which it is alleged that the clerk of the court, by inadvertence, wrote up as the judgment of the jury in the replevin suit that the defendants in that suit were adjudged to be the owners of the property. *Ringgenberg v. Hartman*, 186
2. *Same*.—*Notes*.—*Set-Off*.—In an action upon a replevin bond executed in favor of both plaintiffs, notes held against one of the plaintiffs by the defendants are not available as a set-off. The defendants are es-

- topped to deny that one of the obligees had no interest in the bond sued upon. *Ib.*
3. *Same.—Evidence.—Mitigation of Damages.*—Where the defendants in an action upon a replevin bond hold a chattel mortgage upon the property involved in the replevin suit, they may prove that fact in mitigation of damages. *Ib.*
4. *Demand.—Failure to Prove.—Subsequent Action.*—Where the plaintiffs in an action of replevin do not succeed merely because of failure to prove a demand prior to the time of bringing the action, the judgment rendered against them is not conclusive, and is not a bar to a subsequent action. *Williams v. Lewis, 344*
5. *Same.—Demand.—Proof.*—In the second action it is not competent for the defendant to prove that a demand was in fact made prior to the first action of replevin. *Ib.*
6. *Complaint.—Sufficiency of.*—Under section 1266, R. S. 1881, authorizing actions of replevin for possession of personal property, a complaint which alleges that the plaintiffs are the owners of the property, and entitled to the possession, and that the defendant has possession without right, and unlawfully detains the same from the owner, is sufficient to entitle the plaintiffs to maintain an action for possession. *Turpie v. Fagg, 476*
7. *Same.—Title.*—The complaint is sufficient to try the title to the property without the averment required by section 1267, R. S. 1881, that the property was not seized under an execution, or, if so seized, that it was exempt. *Ib.*

#### REPLEVIN BOND.

See REPLEVIN, 1 to 5.

#### RESCISSION.

See CONTRACT, 15, 16; CONVEYANCE, 1; INSURANCE, 5.

#### RES GESTÆ.

See RAILROAD, 7.

#### RESPONDEAT SUPERIOR.

See MASTER AND SERVANT, 3.

#### REVOCATION.

See WILL, 4.

#### RIGHT OF WAY.

See EASEMENT, 3.

#### RISK.

See MASTER AND SERVANT, 5, 7, 8.

#### SALE.

See CONTRACT, 13; PARTNERSHIP.

*By Car Load.—Substitution of Larger Cars.—Construction of Contract.*—The plaintiff contracted with the defendant to sell and deliver to him twelve car loads of fruit cans, to be shipped in B. & O. freight cars, the number to be shipped in each car not being agreed upon. To lessen the freight expense to the defendant larger cars were procured. Held, that the defendant was entitled to receive under the contract only a sufficient number of cans to fill twelve of the smaller cars.

*O'Ferrall v. Van Camp, 336*

#### SCHOOL BOOK LAW.

See COUNTY SUPERINTENDENT, 1, 3, 7.

SCHOOL LANDS.

See TOWNSHIP, 1, 2, 5.

1. *Purchase.—Forfeiture of Contract.—Re-Sale.—Outstanding Lien.—Tenants in Common.*—A., the assignee of a certificate of purchase of school lands sold in compliance with section 4345, R. S. 1881, occupied the land until his death. At his death his children inherited the land as tenants in common, subject, by the terms of the will, to the widow's life-estate. The interest instalments remaining unpaid after the death of the widow, the land was resold under section 4347, R. S. 1881, and B. became the purchaser.

*Held*, that B., who was the owner, when the sale was made, of an undivided interest by purchase from one of the children, could not acquire title by purchase at such sale against the owner of an undivided interest by purchase from another of the children. *Eaton v. Piggott*, 94 Ind. 14, distinguished. *McPheeters v. Wright*, 560

2. *Same.—Forfeiture.—Effect of.—Surplus.*—A forfeiture, under section 4347, R. S. 1881, upon the failure of the purchaser of school lands to make payments, does not divest the title of the purchaser to the real estate, but simply authorizes the State to sell the real estate for its own reimbursement, the surplus going to the purchaser. *Id.*

SEPARATE ESTATE.

See MARRIED WOMAN, 1 to 4.

SET-OFF.

See REPLEVIN, 2.

SETTLEMENT.

See TOWNSHIP TRUSTEE.

*Mutual Dealings between Parties.—Items of Account.—Presumption.*—Where there are mutual dealings between parties, settlements made and notes given by one of the parties, the presumption is that the settlements covered and included all the items of the account.

*Long v. Straus*, 84

SHELLEY'S CASE.

See WILL, 8.

SHERIFF'S DEED.

See MORTGAGE, 7; REAL ESTATE, ACTION TO RECOVER, 4.

SHERIFF'S SALE.

See MORTGAGE, 6; REAL ESTATE, ACTION TO RECOVER, 4.

SIDEWALK.

See MUNICIPAL CORPORATION, 9, 12 to 14.

SIGNATURE.

See EVIDENCE, 6 to 8.

SLANDER.

See NEW TRIAL, 2.

1. *Express Malice.—Declarations of Defendant Tending to Show.—Admissibility.*—In an action for slander the testimony of a witness tending to show that the defendant knew that the charges he made against the plaintiff were unfounded, is competent for the purpose of proving express malice. *Müller v. Cook*, 101

2. *Same.—Fraudulent Conveyances by Defendant.—Evidence of.*—At the time



of the publishing of slanderous words the plaintiff occupies the position of a creditor and may prove that certain fraudulent conveyances were made by the defendant. *Ib.*

3. *Same.—Defendant's Financial Condition.*—Proof that the defendant, after being threatened with an action for slander, made voluntary conveyances of his property, was competent for the purpose of showing the financial condition of the defendant. *Ib.*
4. *Same.—Impeachment of Witness.*—The rule permitting a party to contradict his own witness applies only where the testimony is a surprise to the party calling him, and is prejudicial; and, hence, a witness called by the defendant having denied, in answer to a question, that he had sexual intercourse with the plaintiff, it was not competent to prove by other witnesses other declarations of the witness to the contrary. *Ib.*
5. *Same.—Evidence.*—A witness for defendant testified that he had a conversation with the defendant in March, which the defendant denied, offering to prove that the conversation took place in November, and to state what was said.  
*Held*, no impeaching question having been asked the witness, that the testimony of defendant as to the conversation in November was incompetent. *Ib.*
6. *Same.—Specific Acts of Impropriety.*—Specific acts of impropriety committed by the plaintiff long after slanderous words are spoken, are not competent evidence. *Ib.*

#### SPECIAL FINDING.

1. *Motion to Strike Out Parts of.—New Trial.*—A motion to strike out parts of a special finding is not authorized by any rule of practice. Where the court fails to find all the facts proven, or finds the facts contrary to the evidence, the remedy is by motion for a new trial.  
*Sharp v. Malia, 407*
2. *What it Must Contain.*—A special finding must find the facts, and state neither conclusions of law nor mere matters of evidence. The ultimate facts only must be stated. *Perkins v. Hayward, 445*
3. *Same.—Ditch Proceeding.*—*Statements as to Public Health and Public Highways.*—The statement in a special finding in a ditch proceeding that the ditch would benefit the public health, is the statement of an ultimate fact, and not of a mere conclusion. The statement that it would benefit several public highways in Steuben and La Grange counties, is the statement of an ultimate fact, and not of a mere conclusion, but is probably so vague and indefinite as to be objectionable. *Ib.*

#### SPECIAL JUDGE.

1. *Adjournment of Term.—Power to Continue Trial Beyond.*—Where a special judge is appointed to try a cause, and after the trial is commenced, the regular judge adjourns the term until the time fixed by law for holding the next regular term, the special judge has authority to proceed with the trial of the cause before him, after the order of adjournment made by the regular judge.  
*Perkins v. Hayward, 445*
2. *Same.—Extent of His Authority.*—When the regular judge yields the bench, calls in a special judge, and duly appoints him to try a designated cause, the special judge thus appointed, acquires full authority over the cause, throughout all of its stages, and the authority of the regular judge is necessarily excluded. Under the provisions of section 10 of article 7 of the Constitution, the Legislature has the power to provide for the appointment of special judges,

and to make provision for investing such special judges with the authority of regularly chosen judges in the cases enumerated. *Batten v. State*, 80 Ind. 394, distinguished. *Ib.*

**SPECIAL VERDICT.**

See MASTER AND SERVANT, 2; RAILROAD, 5, 6.

1. *Failure to Find Essential Facts.—Intendment.*—A special verdict must contain a finding of the facts, and if any fact essential to support the judgment is not found, the judgment must fall. Nothing can be supplied by intendment. *Noblesville Gas, etc., Co. v. Loehr*, 79
2. *Request for Written Instruction.*—It is not error for the court to grant a request for a special verdict, which is made after the party preferring the request has asked the court to instruct the jury in writing, and after the questions of law to be embraced in the instructions have been discussed, as the court has the right to require the jury to return a special verdict without any request from either party. *Lowman v. Sheets*, 416

**STATUTE.**

See CORPORATION, 2, 6; COUNTY CLERK, 1; CRIMINAL LAW, 6, 14, 15, 21, 22; DRAINAGE, 2, 8, 10 to 12; EVIDENCE, 3; GUARDIAN AND WARD; HIGHWAY; JURY, 2; POOR PERSON, 2; PRINCIPAL AND SURETY, 1; REPLEVIN, 6, 7; SCHOOL LANDS; TAX SALE, 3, 4; TURNPIKE; WILL, 4.

**STATUTE CONSTRUED.**

See CONVICT; COUNTY SUPERINTENDENT, 3; DRAINAGE, 10; MUNICIPAL CORPORATION, 3, 4, 8; SCHOOL LANDS, 2; WIDOW.

**STATUTE OF FRAUDS.**

See CONTRACT, 6, 9 to 14; EASEMENT, 4.

*Real Estate.—Verbal Promise to Reconvey.—Parol Evidence to Establish a Trust.*—A widow, the owner in fee of certain real estate by descent from her husband, in order to relieve said real estate from the operation of the statute limiting her right to convey the same during a second contemplated marriage, without consideration conveyed the said real estate to the wife of the brother of her intended husband, relying upon the verbal agreement of the wife, her husband assenting, to reconvey the same after the marriage had taken place. She was induced to make the conveyance through the intimate and confidential relations existing between the parties, and at the earnest solicitation of the grantee and her husband. After the marriage the wife refused to reconvey.

*Held*, that parol evidence was admissible to prove the facts establishing a trust, although the deed was absolute in form, the statute of frauds having no application in such a case, since to apply it would make it an instrument of fraud. *Catalani v. Catalani*, 54

**STOCK AND STOCKHOLDERS.**

See CORPORATION, 6; PLEADING, 10.

**STREET IMPROVEMENT.**

See MUNICIPAL CORPORATION, 3, 4, 6 to 8.

**STREETS AND ALLEYS.**

See MUNICIPAL CORPORATION, 1, 3, 4, 6 to 8.

**SUBROGATION.**

See MORTGAGE, 2; VENDOR AND PURCHASER, 1.

**SUMMONS.**

See JUDGMENT, 1, 2.

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## SUNDAY LAW.

See WILL, 2.

## SUPERVISOR.

See ANIMALS, 2.

## SUPREME COURT.

1. *Weight of Evidence.*—The Supreme Court will not reverse a judgment upon the weight of the evidence. *Bernhamer v. Dawson, 126*
2. *Questioning of Answer by Assignment of Error.*—An answer can not be questioned for the first time in the Supreme Court.  
*Chicago, etc., R. R. Co. v. Modenitt, 212*
3. *Weight of Evidence.*—Where there is legal evidence in the record tending to support the verdict of the jury or the finding of the court on every material point, the Supreme Court will not disturb the verdict or finding on the weight of the evidence. *Stoft v. Herrell, 478*
4. *Weight of Evidence.*—Where there is evidence tending to support the finding of the court, the Supreme Court will not reverse a judgment on the weight of the evidence. *Chutter v. Riddle, 500*

## SURETY.

See CITY TREASURER; MARRIED WOMAN, 6; PRINCIPAL AND SURETY.

## SURFACE WATER.

See EASEMENT, 1, 2.

## TAX SALE.

See DRAINAGE, 8, 9.

1. *Execution of Deed.—Injunction.—Tender.—Pleading.*—In an action to enjoin the execution of a deed to the purchaser at a tax sale on account of irregularities in the sale which render it ineffectual to convey title, a paragraph of complaint which alleges that a tender was made of the amount due, but fails to allege that the tender was brought into court for the benefit of the purchaser, is bad.  
*City of Logansport v. Case, 254*
2. *Same.—Purchaser's Lien.—Void Sale.*—A tax sale, although made in violation of mandatory provisions of the statute, vests in the purchaser the lien of the State upon the land upon which the taxes were leviable, in all cases except where the sale was void because the land sold was not liable to taxation, or where the taxes had been paid, or the description of the land was so imperfect as to fail to identify the land, or where the sale was made without authority of law. *Ib.*
3. *Same.—Sale Ineffectual to Convey Title, but Carrying Lien of State.—Redemption by Delinquent Taxpayer.—Statute.*—Where a tax sale is ineffectual to convey title, but carries to the purchaser the lien of the State (section 6488, R. S. 1881), the delinquent taxpayer can redeem from such sale only upon the conditions prescribed by section 6466, R. S. 1881, relating to redemption from tax sales. *Ib.*
4. *Foreclosure of Tax Lien.—Costs.—Liability of County.*—Where an action is brought in the name of the State, on the relation of the prosecuting attorney, to foreclose the lien of the State for taxes (Elliott's Supp., section 2147), and a sum sufficient is not realized from the sale of the real estate to pay the costs due the officers of the court in consequence of the proceeding, the county in which the land is listed is not liable in its corporate capacity for the balance of such costs.  
*Abbott v. Board, etc., 467*

## TENANTS IN COMMON.

See SCHOOL LANDS, 1.

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See COUNTY SUPERINTENDENT, 4, 7; FRAUDULENT CONVEYANCE, 1;  
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REFLEVIN, 7; SCHOOL LANDS, 1.

TOWN.

See MUNICIPAL CORPORATION, 2.

TOWNSHIP.

1. *Purchase by Trustees of School Land for Joint Graded School.—Statute.*—The statute, section 4446, R. S. 1881, empowers the trustees of two or more school townships to organize a joint graded school, and to purchase suitable real estate to be used for that purpose. The trustees are the sole judges of the right to purchase property of this character, and in the absence of fraud between the trustees and the seller their decision is conclusive. *Craig School Tp. v. Scott, 72*
2. *Same.—Propriety of Purchase.—Action upon Note for Purchase-Money.*—The advisability or necessity of the school, or the question as to whether the property purchased was suitable or proper, can not be inquired into in an action upon a note given for the purchase-money. *Id.*
3. *Same.—Parties.*—In an action upon the note for the purchase-money, which was made payable to the trustees of the Moorefield Lodge of Masons, the vendors of the real estate, and by them endorsed and assigned to the plaintiff, neither the trustees nor the grand lodge is a necessary party defendant. *Id.*
4. *Same.—Fraternal Order.—Knowledge of Members not Knowledge of Order.*—The knowledge of a member of a fraternal order of any fact is not the knowledge of the order; and the charge of fraudulent knowledge of the order is not established by the fraudulent knowledge or actions of a member of it. *Id.*
5. *Same.—Fraudulent Purpose of Trustee.—Sale by Vendor in Good Faith.—Recovery on Note for Purchase-Money.*—Although the trustee had a fraudulent purpose in purchasing the property, if the sale was made by the vendor in good faith, and taken possession of by the township and retained, a recovery on the note for the purchase-money can not be defeated. *Id.*
6. *Certificates.—Fraudulent Issue of.—Rights of Assignee.*—By a conspiracy between a township trustee and the plaintiff's assignor certificates of indebtedness were issued for lightning-rods erected on the school-houses of the township to an amount almost four times their value. One of the certificates was assigned to the plaintiff, who seeks a recovery upon it against the township.  
*Held*, that the certificate is void, and that the township, although it has not rescinded the contract, and retains the benefit thereof, is not bound upon it.  
*Held*, also, that the assignee is not entitled to recover on the certificate the actual value of the goods furnished the township.

*Boyd v. Mill Creek School Tp., 193*

TOWNSHIP CERTIFICATES.

See TOWNSHIP, 6.

TOWNSHIP TRUSTEE.

See TOWNSHIP.

*Settlement.—Appeal from County Commissioners.*—A taxpayer who alleges

that he is aggrieved by the action of the board of county commissioners in approving a report and settlement made by the sureties on the bond of a township trustee, can not appeal to the circuit court by filing an affidavit and appeal bond. In making settlements with township trustees, and in the examination and confirmation of their reports, county commissioners act, not judicially, but in a ministerial capacity, and the general right of appeal authorized by statute is applicable only to decisions of a judicial character.

*Bunnell v. Board, etc., 1*

#### TRIAL.

See SPECIAL JUDGE.

#### TRIAL BY JURY.

See DECEDENTS' ESTATES, 2.

#### TRUST.

See STATUTE OF FRAUDS.

#### TURNPIKE.

1. *Construction of Instead of Bridge.—County Commissioners.—Petition not Required.—Statute.*—Under the act of March 7th, 1885, authorizing the board of commissioners to order the construction of a free turnpike road instead of a bridge, if in their opinion the pike can be so constructed as to avoid the necessity of a bridge, and be of the same public convenience, no petition is required. The board may proceed on its own motion. *McClure v. Board, etc., 154*
2. *Same.—Location of New Road.*—Under the act the board, where there is no established highway over the route of the proposed road, may order a new road to be laid out. *Id.*

#### VARIANCE.

See CRIMINAL LAW, 2.

#### VENDEE'S LIEN.

See TAX SALE, 2, 3.

#### VENDOR AND PURCHASER.

1. *Vendor's Lien.—Principal and Surety.—Subrogation.*—J. became the surety of the purchaser of land on a note given to the vendor to secure the purchase-money. The purchaser mortgaged the land to the surety to secure him against loss. The surety, who had been compelled to pay the purchase-money, foreclosed the mortgage after the mortgagor's death. *Held*, that the right of the surety was superior to that of the widow of the mortgagor, he being subrogated to the lien of the vendor to whom the purchase-money was paid.
- Held*, also, that the widow, until the purchase-money was paid, had only the right to redeem. *Ballew v. Rober, 557*
2. *Same.—Former Adjudication.*—A decree of foreclosure estops a party from setting up any title acquired before the decree was rendered. *Id.*
3. *Fraud on Part of Vendee.—Vendor's Lien.*—Where a vendee fraudulently induces a vendor to accept in payment of the purchase-money property that is worthless or of less value than that represented, the lien is not waived. *Nysswander v. Lowman, 584*

#### VENDOR'S LIEN.

See VENDOR AND PURCHASER, 1, 3.

## VERDICT.

See CONTRACT, 4; INSURANCE, 2; INTOXICATING LIQUOR, 1.

1. *Answers to Interrogatories.*—If there is any reasonable hypothesis whereby the general verdict and the answers to interrogatories can be reconciled, the general verdict will be sustained.

*Western Assurance Co. v. Studebaker, etc., Co., 176*

2. *Answers to Interrogatories.—Judgment.*—Where there is any reasonable hypothesis upon which the general verdict and the answers to interrogatories can be reconciled, the general verdict will control the judgment of the court.

*Allemon v. Simmons, 199*

## WAIVER.

See INSURANCE, 4.

## WARRANTY.

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## WATERCOURSE.

See EASEMENT, 4.

## WIDOW.

See DECEDENTS' ESTATES, 1, 3; WILL, 1.

*Expenses of Husband's Last Sickness.—Liability.—Statute Construed.*—Under section 2422, R. S. 1881, making the widow liable for the expenses of the last sickness of her husband, when the estate is set off to her on petition, a suit is not maintainable against the widow on a judgment rendered against the husband upon a note executed by him before his death for medical services. The widow is liable only for an unliquidated indebtedness created on account of the last sickness of the husband, and is not liable to suit on notes executed by her husband or the judgments rendered against him. *Weir v. Sanders, 391*

## WILL.

1. *Construction.—Estate During Widowhood.*—A testator devised to his wife and heirs, "for her to dispose of as she sees best \* \* \* the tract of land now living on \* \* \* during the time she lives a widow, or in my name. Then said land is to be divided equally amongst the present heirs of David Rupert and Mary, his wife, or the proceeds of the same, as the case may be."

*Held*, that the will vested in the widow an estate in the land during her widowhood, with an absolute power to sell and dispose of the same during the continuance of her estate, no intention being manifested by the testator in his will to devise a particular estate coupled with the condition that the wife should not remarry.

*Held*, also, that the widow having remarried without disposing of said estate, the estate ceased upon said second marriage, and that the land remained for distribution among the children of the appellee and the testator in accordance with the terms of the will.

*Levengood v. Hoople, 27*

2. *Execution of on Sunday.—Validity.—Sunday Law.*—A will executed on Sunday is valid. The drafting and execution of a will on Sunday do not come within the definition of "common labor," so as to be prohibited by section 2000, R. S. 1881, making it a penal offence to be found engaged in common labor, or in one's usual avocation on that day.

*Rapp v. Reehling, 36*

3. *Same.—Contradiction of its Terms.—Extrinsic Evidence.*—Extrinsic evidence is inadmissible to contradict the terms of a will, or to show that the testator's intention was different from that therein expressed. *Ib.*
4. *Revocation.—Adoption of Child.*—The adoption of a child, under the

statute of this State, does not operate to revoke an antecedent will of the adopting father, although he has made no provision by the will or otherwise for such adopted child. By section 2560, R. S. 1881, the revocation of a will is not contemplated upon the adoption of a child.  
*Davis v. Fogle, 41*

5. *Construction of.—Conditional Life-Estate.—Remainder Over in Fee to Lawful Heirs.*—A testator devised land to his son during his natural life, declaring that upon the death of his son or upon his refusal to occupy or live on the farm, "I will, devise and bequeath the same to the said Samuel M. Conger's heirs." Samuel M. Conger took possession of the farm, but afterwards conveyed it by warranty deed, and ceased to live upon it. This suit is by the children of Samuel M. Conger, who is still in life, their claim being that under the will of their grandfather the title vested in them, and that they became entitled to the possession when their father abandoned and conveyed away the land.

*Held*, that the word "heirs" is to be construed to mean "children," and that upon the death of the testator the devisee took a life-estate in the land defeasible upon condition that he refused to live upon or occupy the estate, and that the will created a vested remainder over in fee to the testator's children, to take effect in possession upon the termination of the estate of the father.

*Held*, also, that immediately upon the conveyance by their father the children were entitled to possession.  
*Conger v. Lowe, 368*

6. *Same.—Life-Estate.—Remainder.—Restraint upon Alienation.*—Where an estate for life, or years, is created with a reversion to the grantor, or a valid remainder over to designated persons, conditions imposing restrictions and qualifications upon the power to alienate or use the estate are valid.  
*Ib.*

7. *Same.—Power to Restrain Alienation.—Foundation of.*—The foundation of the power to restrain alienation rests upon the fact that there remains, or is vested, in some one a valid remainder or reversion, whose estate in possession is contingent upon some event, which defeats the precedent estate, and who is entitled to take advantage of the prohibited act or use.  
*Ib.*

8. *Same.—Word "Heirs."—Meaning of Term.—Rule in Shelley's Case.*—When it becomes manifest that the word "heirs" was used as a synonym for "children," or in some modified sense, the rule in Shelley's case will not be applied to overturn the testator's intention.  
*Ib.*

#### WITNESS.

See ASSAULT AND BATTERY, 1; DECEDENTS' ESTATES, 3.

*Exclusion.—Withdrawal of Objection.*—Where a witness is excluded, and the objecting party afterwards withdraws his objection, and the court offers to permit the witness to testify, the error, if any, in the first ruling, is completely obviated.  
*Colglazier v. Colglazier, 196*

#### WORDS AND PHRASES.

See CRIMINAL LAW, 6; WILL, 5, 8.

END OF VOLUME 124.

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